No. 2405

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

F. DREW CAMINETTI,
Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA,
Defendant in Error.

BRIEF OF THEO. J. ROCHE, SPECIAL ASSISTANT TO THE ATTORNEY GENERAL OF THE UNITED STATES.

THEO. J. ROCHE,
Special Assistant to the Attorney General.

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Of Counsel.

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I.

GENERAL STATEMENT OF THE CASE AND MAIN FACTS RELIED UPON BY THE GOVERNMENT TO SUSTAIN CONVICTION.

The plaintiff in error has been convicted and sentenced under the first count of an indictment filed against him, in which it is charged that

> "on the 15th day of January, in the year of our Lord, One Thousand Nine Hundred and Thirteen, in the city of Sacramento in the State and Northern District of California, then and there being, did then and there wilfully, knowingly, feloniously and unlawfully transport and cause to be transported, and aid and assist in obtain-

ing transportation for and in transporting in interstate commerce from Sacramento, in the State and Northern District of California, to Reno in the State of Nevada, over the line of railroad of the Southern Pacific Company, a certain girl, to wit: one Lola Norris, for the purpose of debauchery and for an *immoral purpose to wit: that the aforesaid Lola Norris should be and become the concubine and mistress of the said defendant;*

That the Southern Pacific is and was, the plaintiff then and there well knew, a common carrier engaged in the business of transporting and carrying passengers in interstate commerce, to wit: from the State of California to the State of Nevada, and did act in such capacity in bringing said Lola Norris from the State of California to the State of Nevada."

The indictment was framed under the act of June 25, 1910 (36 Stat. 825) entitled "An act to further regulate interstate and foreign commerce by prohibiting the transportation therein for *immoral purposes* of women and girls, and for *other purposes.*" (Italics ours.)

The second section of the act provides:

"That any person who shall knowingly transport or cause to be transported or aid or assist in obtaining transportation for or in transporting in interstate or foreign commerce * * * any woman or girl for the purpose of prostitution *or debauchery or for any other immoral purpose,* or with intent and purpose to induce, entice or compel such woman or girl to come a prostitute or to give herself up to debauchery or to *engage in any other immoral practice;* or who shall knowingly, procure or obtain or cause to be procured or obtained, or aid or

> assist in procuring or obtaining, any ticket or tickets, or any form of transportation or evidence of the right thereto, to be used by any woman or girl in interstate or foreign commerce * * * for the purpose of prostitution or debauchery *or for any other immoral purpose,* or with the intent or purpose on the part of such person to induce, entice or compel her to give herself up to the practice of prostitution, or to give herself up to debauchery *or any other immoral purpose,* whereby any such woman or girl shall be transported in interstate or foreign commerce * * * shall be deemed guilty of violating, etc."

Section 8 of the statute provides:

> "That this act shall be known and referred to as the White Slave Traffic Act."

The main contention of the accused is that he is not a so-called "White Slaver" and that the immoral purpose and practices ascribed to him in the transportation of Lola Norris in interstate commerce from Sacramento, California, to Reno, Nevada, do not come within the inhibition of the statute for the reason that the purpose was not a commercial one on his part in that no profits were to accrue to him personally as the outcome of immoral practice on the part of the girl or the debauchery of the young woman. The claim is strenuously put forth that taking a woman to another state to make her his concubine or mistress, in no way constitutes an offense against the law. This identical question, in our judgment, has been determined adversely to the contention of the plaintiff in error, by the

Supreme Court of the United States and by other federal courts, as we shall show in a later subdivision of this argument.

It is not our purpose in this argument to follow with elaborate detail the many questions discussed at length in the four hundred page brief of the plaintiff in error. Many of them have been repeatedly discussed and disposed of in the various federal courts. The matters of substantive law involved and the rules proper to be stated by a trial judge for the guidance of the jury in passing on the facts, were so admirably stated in the charge of Judge William C. Van Fleet that we have taken the liberty of incorporating the same herein and adopting the same as a part of the argument. Aside from the clear statement of the law therein found this charge has not been printed in the record, and we deem it only fair to the court that it should be put in such form as to make it easily accessible to the several judges.

MAIN FACTS RELIED UPON BY THE GOVERNMENT.

The *dramatis personae* involved in the several scenes of female debauchment and male degeneracy covered by the indictment in the case at bar are: Maury I. Diggs, F. Drew Caminetti, Marsha Warrington and Lola Norris.

Maury I. Diggs was formerly architect for the State of California, and afterwards an architect of good business standing, having for offices three

rooms in the Diepenbrock Building in the City of Sacramento. He was the oldest of the four parties concerned. Among his business assets he possessed an automobile, which seems to have been used as well for his pleasures as for his business. He had a wife and young daughter, with whom he lived.

F. Drew Caminetti, plaintiff in error, was a slightly younger man, employed in a subordinate position in the office of the State Board of Control at Sacramento. He also was married and living with his young wife and two children.

The victims of the wiles of these two young men, in the persons wrongfully transported in interstate commerce, were two young girls, one about and the other under the age of twenty years.

Marsha Warrington was the daughter of T. H. Warrington, general agent in Sacramento of the Santa Fe Railroad Company. The father testified at page 232:

> "I am the father of Marsha Warrington. Her mother died in 1898 when she was five years old. During the month of March, 1913, I resided at 1621 Eighteenth Street, Sacramento. I resided there with my family consisting of my wife, two daughters and my son. I never had met the defendant in this case under the name of F. Drew Caminetti. I knew a man by the name of Whitman. Prior to the month of March, 1913, I had known this man who went under the name of Whitman possibly four to six weeks. I first met him in my house. He called there for my daughter, Marsha Warrington."

The witness then testified that the man whom he met in his house as Whitman was the defendant Caminetti.

From the time Marsha left school she had been employed by her father in his business (228).

She testified herself:

> (228) "During the month of March, 1913, I was employed by my father. I had been employed by him from the time I left school. * * * I know the defendant in this case, F. Drew Caminetti. I have known him since the latter part of last October, 1912. I know Maury I. Diggs. I was introduced to him last September."

She testified further that Diggs introduced Caminetti to her at the corner of Tenth and K streets. At page 228 she testified:

> "That was the second time that I had ever seen Mr. Diggs. At the time of that introduction Miss Norris was also present. The appointment was arranged by telephone. Mr. Diggs telephoned to me, and Mr. Caminetti telephoned to Miss Norris and then Mr. Diggs telephoned to Miss Norris and then telephoned to me again. Between the first time I met Mr. Diggs and the second time, he had frequently telephoned to me but I had refused to see him. On the first occasion to which I had referred, when the four of us met for the first time, we went just for a ride in Mr. Diggs' machine. Mr. Diggs was driving the machine himself."

The remaining victim was the child of W. E. Norris, a retired railroad man of 1012 "P" Street, Sacramento.

Mr. Norris testified:

> "I live at 1012 'P' Street, Sacramento. I have resided there for a great many years with my family consisting of my wife and daughter. My daughter's name is Lola Norris. She is the only child."

He also testified that Caminetti was introduced to him as Whitman.

Lola Norris testified:

> (285) "During the early part of March, 1913, I was employed in the State Capitol in the Library. I had been employed in the Library of the State Capitol a little over a year. That was my first employment after leaving school. I am twenty now. I was twenty on the 3rd day of August, 1913. *In March, 1913, I was nineteen years of age.* * * * During the months of February and March, 1913, I went to school at night, I was taking up a course of stenography at night. I was attending a public school. I attended that school at night a month previous to going away, * * * three times a week from seven till nine. I went to night school to learn stenography because I was employed in the daytime. I know Miss Marsha Warrington. I have been acquainted with her for a number of years. *I know her quite well.* * * * I know the defendant in this case, F. Drew Caminetti. *I have known him a little over a year.* I met Mr. Caminetti at a dance at the Hotel Sacramento. I became more or less *intimately acquainted with him a year ago.* The first time I went out with Mr. Caminetti was the last part of October, 1912. * * * *Up to the latter part of October, 1912, he had never called at my house and I had never been out with him to any place. I know Maury I. Diggs. I first became acquainted with him the last part of October of last year.* That was

the occasion when I first went out with Mr. Caminetti. Mr. Caminetti rang me up on the phone one evening and *asked me if I would introduce him to Miss Warrington. He said that Mr. Diggs was anxious to meet her and that he would like to make the two of them acquainted.* At that time I had heard of Mr. Diggs but I had never seen him. I said I would introduce him to Miss Warrington. * * * I think the appointment at that time was made. In any event the four of us did meet. I received no communication other than from Mr. Caminetti regarding that meeting. On this first occasion we rode around in Mr. Diggs' automobile for about two hours."

The mutual introductions and the bringing together in close communication of these four proved to be the ruin of the two young girls.

Following this acquaintance, generated as above, between the four parties subsequently engaging in the Reno trip, so-called, the relations between the parties grew rapidly more intimate and more improper. Marsha Warrington, at pages 228-9, testified:

"I recall a trip to Reno which was taken upon the early morning of March 10, 1913. I don't know how many times we had been together from the time I first met Mr. Diggs up to the time we went to Reno. It varied. *Sometimes once or twice and sometimes three or four times a week. The meetings occurred with more frequency during the latter part of the period.* * * * During the latter part of that period we went out very frequently. * * * Mr. Caminetti called at my home. Mr. Diggs never called at my home. Miss Norris was attending night school. * * * During the

three or four or five weeks before I left upon the Reno trip, *the four of us would meet four or five times a week. Mr. Caminetti would get me at my home.* We would then meet Mr. Diggs, then Mr. Caminetti would either go with us or would leave us and then meet Miss Norris at night school at nine o'clock, and *the four of us would meet afterwards.*"

The meetings of the four parties were frequently held at late hours in the offices of Diggs in the Diepenbrock Building. Diggs and the Warrington girl occupying one of the rooms while Caminetti and the Norris girl would occupy the other. Such meetings frequently lasted until eleven o'clock at night.

As early as December, 1912, according to the testimony of Miss Warrington, Diggs had accomplished the ruin of Marsha Warrington, who before the time of the Reno trip had become pregnant. Some time thereafter a trip was made to San Francisco in the Diggs automobile. It was evidently brought about so far as the Norris girl was concerned by the invitation of Miss Warrington under the instigation of Diggs, and both girls were persuaded to take this trip upon the promise that when they reached the city they should be permitted to occupy a room by themselves. The parties went to a hotel where Lola Norris had never been before and Diggs and Marsha Warrington were assigned to one room.

Speaking of the visit to the hotel, Lola Norris testified:

(289) "We went to a hotel. I had never been there before. * * * *Mr. Diggs and Mr. Caminetti registered and the clerk showed us to rooms, Miss Warrington and Mr. Diggs to one room and Mr. Caminetti and me to an adjoining room.* Mr. Caminetti did not make any mention regarding registering as husband and wife at all. After we got to the rooms I thought in order to avoid the suspicion of the clerk we would remain that way until he left and that then Miss Warrington and I would occupy one room and Mr. Diggs and Mr. Caminetti another, but as soon as the clerk left the room I went over towards the door of the room which Mr. Diggs and Miss Warrington occupied and just before I got there I heard the key turned in the lock and then I went over to the door and knocked and called to them but neither of them paid any attention to me. I knocked off and on for an hour or more and finally *Mr. Caminetti told me that if I did not stop making so much noise, the clerk would come and put us all out and so I stopped. The room for Mr. Caminetti and I was a bedroom. Mr. Caminetti retired.* He spoke to me about retiring but I refused to retire."

Following this night of the parties in a San Francisco hotel, a visit was made by automobile by the four parties to San Jose and another hotel stay was made there.

Speaking of the San Jose experience Miss Norris testified:

(290) "We did not leave San Jose on Sunday night. Mr. Diggs said that he did not think he would be able to get home that night and that—this was in the presence of the defendant—the four of us were together on that

occasion—he said it was impossible for us to hope to get home to Sacramento that night; that we would have to stay over in San Jose; that if we started we would not get home until next morning anyhow and he thought we had better go to San Jose and stay all night there and leave early the next morning for Sacramento. I think that statement was made about six o'clock in the afternoon. The defendant spoke to me while I was in the room at the Grand Hotel and after I failed to attract the attention of Mr. Diggs and Miss Warrington, about getting into bed. I don't know the name of the hotel in San Jose to which we went the next night. We got to the hotel early, about nine o'clock. *Two rooms were obtained. Mr. Caminetti occupied a room with me. Mr. Diggs occupied a room with Miss Warrington. We left there next morning about half after two. Mr. Caminetti retired that night. He took his clothing off. I retired. I took my clothing off.*"

Notwithstanding this situation, this witness at page 291 persisted that she did not there submit herself to Mr. Caminetti.

On a later occasion the parties in combination made a visit to Stockton, the same witness stating:

(292) "I just remember one occasion of going to Stockton. We went to a place called the Heidelberg. We retired to private rooms."

The testimony of the witness Marsha Warrington confirms the various details given by Lola Norris of the illicit relations that prevailed among these four young people.

The number and character of the meetings of the four were so frequent and so public that they attracted the attention of other people.

On account of the frequent assembling of the four at Diggs' rooms in the Diepenbrock Building, the janitor of that building called the fact to the attention of its owner. Even the families of Diggs and Caminetti became aware of the improper relations carried on by the two husbands with the two young women. Accordingly Diggs and Caminetti made up their minds to leave the State of California, at the same time insisting that their partners in their various escapades should accompany them and *live with them in some other place,* upon their promise to secure divorces from their respective wives with whom they were living unhappily and marry them.

At page 292, Lola Norris testified:

> "I recall the 10th of March, 1913, the date upon which I left Sacramento. I first heard a discussion as to leaving Sacramento just about a week before we left. That discussion took place over the telephone. Mr. Diggs called me up over the telephone and discussed it. *Mr. Caminetti was with him and he also talked. Mr. Caminetti also telephoned at the same time.* Miss Warrington was at my house that afternoon. Mr. Diggs called me up on the phone. He said he had something very important that he wanted to tell Miss Warrington and me and said that Mr. Caminetti was with him there and he should like to take us for a ride and discuss the matter. *Then Mr. Caminetti came to the phone and talked and they both said there was something we ought to know and we should come out with them and no matter what would happen that we should come out and hear what they had to tell* us because it was to our advantage to know what it was. * * * I told him we

could not go out that afternoon and we did not go. That was all over the telephone up to that time."

(293) "I next saw Mr. Caminetti and Mr. Diggs on the next night, Monday night. * * * Mr. Diggs had told me that he was hiding at the Columbia Hotel and that it was absolutely necessary for him to leave town. *He told me I had better consider the matter and go with him; that it was just as necessary that I go as for them to go. * * * Mr. Caminetti said that that was right; that anything Mr. Diggs said was true and that it was necessary we should go.* During that entire hour we were discussing going away. Miss Warrington was not there that night. After I told Mr. Caminetti that I would not go away he said 'Well, I have to go anyway.' *He said if Mr. Diggs went he would go with him.*"

(294) "Between the first conversation to which I referred, occurring on the Sunday preceding the day of our departure, and the date of our departure, I talked about almost every night with Mr. Caminetti and quite a few nights when Mr. Diggs and Miss Warrington were present, too. Upon those occasions when I would meet Mr. Caminetti alone, that is not with Mr. Diggs, Miss Warrington was not present. *Upon those occasions when I and Mr. Caminetti would alone meet at night, I would remain in his company about an hour and a half or two hours.* * * *"

(295) "During these conversations that occurred between myself and Mr. Caminetti I said I would not go. I said I could not go because *I did not want to leave my parents at home. I did not know how my mother would stand the shock and I did not want to leave Sacramento.* I wanted to stay there. * * * During this conversation he did not state to which place I was to go. *We were to go away with them,*

Mr. Diggs and Mr. Caminetti. Upon those occasions when I and he were alone he said he was not living happily with his wife."

(296) "On Saturday before we left, that was the day before, Mr. Caminetti said that his wife would start action for a divorce as soon as she found out that he was gone and then we would be married."

Speaking of a previous conversation at the Columbia Hotel where Diggs was in hiding, Miss Norris testified:

(297) *"They said we had better decide to go away with them. They wanted us to go that night and we refused to go and we did not go. I told them that my mother was ill and I thought it would kill her if I went away. That was the night that Mr. Diggs told me that it took bullets to kill and that he knew that my mother would get over it all right. Mr. Caminetti said my mother would get over it and he knew she would feel a great deal worse if I stayed in town* and put all this disgrace and humiliation on my family than if I did go away and there was just a little item in the paper about my disappearance.

They said that their wives would start action for divorce just as soon as they found that their husbands had gone. Mr. Caminetti said that if his wife did not, he would get a divorce in a certain length of time if his wife had not taken any action. Mr. Caminetti said that we would be married after these divorces were granted."

At page 300 the witness was asked:

"Q. By the way, did Miss Warrington at any time prior to your departure from Sacramento ever invite or ask you or request you to go?

A. Miss Warrington and I talked about it when we were alone several times; we both had our opinions on the matter; *Miss Warrington never told me that I had to go or ask me to go or anything of the kind.*"

Speaking of a meeting at the Peerless Restaurant in Sacramento, on the day before their departure, witness said:

(300) "Prior to the termination of this conference at the Peerless Restaurant, no preparations of any kind had been made by myself to leave Sacramento nor by Miss Warrington to my knowledge."

Referring to a conference between herself and Miss Warrington at her house early on Sunday, the date of their departure, the witness testified:

(301) "She came to my house before we agreed to meet Mr. Diggs and we both agreed we would not go. She said she had thought it over during the night and I said I had done the same and *we decided to stay home and bear any disgrace or humiliation that might come to us and stand the disgrace.*"

At the conclusion of the meeting held in the Peerless Restaurant on the day before, it was arranged that Diggs and Caminetti should meet the two girls Sunday afternoon for the purpose of making final arrangements for their trip. After the conference had between the two girls on Sunday morning, as the result of which they concluded that they would not leave their homes, they met Diggs, pursuant to the appointment made the day before.

As to what transpired at this meeting, the same witness, Lola Norris, testified:

> (301) "We said that if Mr. Diggs and Mr. Caminetti—*when we met Mr. Diggs, Miss Warrington told him we had decided not to go.* * * * He (Diggs) said that *Mr. Caminetti was at the present time getting some money to finance the trip; that he and Mr. Caminetti had an agreement between them to meet Miss Warrington that night; that we were to leave that night.* We talked to him for a long time and tried to persuade him to say that he thought it would be safe for us to stay in Sacramento. We told him we were willing to stay in Sacramento. He said it was absolutely foolish to talk that way; that if we were as familiar with affairs as he was we would not think of staying."

Apparently as the result of these frequent and long continued and persistent arguments—and entreaties on the part of Diggs and Caminetti the two young women were prevailed on to consent. At page 302 witness Norris says:

> "We left Mr. Diggs about six o'clock. We went to Miss Warrington's home. She got a valise and put some clothes in it. From her home we went to my home. We sat on the porch about twenty minutes with my mother and father and then we left. I do not think I took anything with me. I took a few handkerchiefs. From my home we took the car to the Saddle Rock restaurant * * * When we reached the Saddle Rock restaurant, Mr. Diggs and Mr. Caminetti were there."
>
> (303) "We were in a box. The four of us remained together about half an hour before any member of the party separated. We dis-

cussed different places to which we would go. * * * Mr. Diggs thought Salt Lake would be a good place, but then decided that that was rather a long trip and he was afraid that he did not have enough money to finance it. Then Los Angeles was suggested but Mr. Diggs said we could not go there because he was too well known there. Then I believe either he or Mr. Caminetti suggested Reno and we decided to go to Reno. Mr. Caminetti gave me $20 to buy my ticket * * * We were to take the train at 10:40, I believe the first train was, for Reno. Mr. Caminetti did not get back in time so we took a later train. * * * When we agreed on Reno just before Mr. Caminetti left he gave me $20. I don't know whether he wanted me to buy my own or to buy my own and Miss Warrington's together. Immediately after that Mr. Diggs said that he would buy the tickets. He said that if Miss Warrington and I went separately and bought our tickets it would be sure to cause some suspicion and he said we would be much more likely to carry the affair off successfully if we would go all together. He said somebody ought to manage the party; that if each one wanted to follow his own inclination we would never make any headway at all. He said some one would have to manage the party and the others would have to abide by his decisions; and so *Mr. Caminetti said 'I will make you the boss',* and so Mr. Diggs took charge of the party. *Mr. Caminetti and Mr. Diggs were to share the expenses.* After that Mr. Caminetti left."

While waiting for Caminetti's return, the party waited in the Saddle Rock Restaurant for him.

At page 304, Miss Norris said:

"We waited there for some time and then Mr. Caminetti finally appeared. He said he

had been having quite a time trying to locate the party who was to give him the money; that he finally succeeded in finding him and he secured the money and we all went down to the depot again. We reached the depot about fifteen minutes before the train left. Mr. Diggs went to the ticket office and bought the tickets. We got in the train. The car we got into was a Pullman sleeper. There was a vacant section in the Pullman car and Mr. Diggs asked if there were not a vacant drawing room, and the conductor said yes, there was one that was not occupied, so Mr. Diggs gave him six dollars, I believe it was, and took the drawing room. Mr. Diggs gave the railroad tickets to the conductor."

At page 305 the witness further testified. The witness speaking of the drawing room said:

"I think it was made up before we went in. We went in there; the drawing room was made up before we went in. Mr. Diggs and Miss Warrington occupied the lower berth and I lay on the couch for about half an hour and then Mr. Caminetti and I occupied the upper berth. * * * "

(306) "We remained in those berths all night. We arose the next morning, I think it was about eight o'clock. The next morning Mr. Diggs said that he and Mr. Caminetti would go out just as soon as we arrived in Reno and rent a cottage and we would live there. There were some names discussed and it was finally agreed that Mr. Caminetti would go under the name of Mr. Ross and Mr. Diggs would go under the name of Mr. Enwright."

At Reno, the parties the first night occupied adjoining rooms in the Riverside Hotel,—Diggs and

Miss Warrington occupying one room and Caminetti and Miss Norris the other. Their names were noted on the hotel register by Diggs and Caminetti as Enwright and wife and Ross and wife. While Caminetti and Diggs were away from the hotel looking for a place to occupy in Reno, the girls remained at the Riverside Hotel.

Speaking of their return, Miss Norris testified at page 306:

> "Upon the return of the two men to the hotel on Monday afternoon or evening, they said they had rented a bungalow. The next morning I recall going out to the bungalow with Mr. Caminetti. When we reached the bungalow we met Mr. Diggs and Miss Warrington and some man who was there taking an inventory of the articles in the house. The four of us continued to occupy that bungalow until Friday morning, I think it was. I occupied the rear bedroom with Mr. Caminetti. Miss Warrington slept in the front part with Mr. Diggs. Upon the three nights that I occupied this rear room with Mr. Caminetti, upon retiring we both disrobed. * * * During the three nights that I was there in the bungalow I had sexual intercourse with Mr. Caminetti."

The witness persisted that this occasion in Reno was the first time that Caminetti had fully accomplished his purpose, and counsel for Caminetti in their brief call attention to that statement.

After three days of experience in the bungalow friends of the girls in Sacramento became apprised of their presence and had the parties apprehended by Chief of Police Hillhouse of Reno and the party was broken up.

Among the matters strenuously insisted upon by counsel for plaintiff in error is one that there was no specific intent that any immoral purpose should be accomplished as a result of or in connection with the interstate transportation. Attention is called to this language found at page 280 of the record:

> "Mr. ROCHE. I would like to ask just one question with your honor's permission. Q. Miss Warrington, you were asked on cross-examination what the specific intent was with which the four of you went to Reno; what the conversation was among the four of you, yourself, Miss Norris, Mr. Diggs and Mr. Caminetti, as to what would be done by the four of you just as soon as you did reach Reno?
>
> A. We were to live there until they secured their divorces, which would be in six months.
>
> Mr. ROCHE. Q. Live where and with whom?
>
> A. Mr. Diggs and Mr. Caminetti."

Aside from this evidence, however, which is a conclusive answer to the claim thus advanced by plaintiff in error, the record is replete with evidence showing that the paramount purpose and specific intent with which the trip was taken, so far as Diggs and Caminetti were concerned, was to live and cohabit with Marsha Warrington and Lola Norris.

The relations proved to have existed between the parties prior to the Reno trip, the frequent and promiscuous intercourse taking place between them, their travels to San Francisco and San Jose, the late night meeting ofttimes occurring at Diggs' office and events there transpiring, their expressed

intention, ofttimes repeated, of making these two women their wives, their conduct in the Pullman car whilst speeding towards Nevada, the manner in which the parties registered at and temporarily resided in the hotel at Reno, the renting of the bungalow for their occupancy and the long period for which they stated they desired to rent this habitation, the manner in which they lived in this bungalow and the sexual relations there sustained, are conclusive upon this point.

As bearing upon this question, the very late case of *Johnson v. United States of America,* decided by the United States Circuit Court of Appeals, Seventh Circuit, January, 1914, is directly in point. There Judge Baker, speaking for the court, said:

> "On the evidence thus far cited, a suspicion might be entertained that the purpose of the transportation was sexual intercourse. This evidence also is consistent with the theory that defendant had no sexual intent at the time he aided the girl in her travels. And the presumption of innocence would require the adoption of this theory if here the evidence stopped. But the record further establishes that before aiding this girl defendant habitually indulged in promiscuous sexual intercourse; that this girl was a prostitute; that defendant first met her several years before in a brothel; that throughout the period of their acquaintance they maintained sexual relations; and that frequently defendant in his journeys about the country took the girl with him or had her travel to meet him, and always for the purpose of sexual intercourse. *This additional evidence furnished a basis from which the jury could justifiably draw the infer-*

ence of fact that when defendant furnished the transportation he did so for the purpose of having sexual intercourse with the girl after their arrival in Chicago, just as a jury may reject a defendant's protestation of innocence in passing counterfeit when the evidence shows that prior to the act in question he had habitually or frequently passed other similar counterfeits."

Shortly thereafter and on the 6th of May, the indictment under the White Slave Act was filed in San Francisco. The indictment was in four counts, the first of which has been set out on a preceding page. That involved the charge that the transportation to Reno of Lola Norris was that she should be and become the concubine and mistress of Caminetti.

The second count charged that the transportation in the case of Marsha Warrington was that she should be and become the concubine and mistress of Maury I. Diggs.

The third count charged Caminetti with wilfully, unlawfully, feloniously and knowingly persuading, inducing and enticing and causing to be persuaded, induced and enticed, and aiding in such inducement and persuasion, Lola Norris to make the trip in order that she should become the concubine and mistress of the said defendant;

The fourth count was similar to the third, the purpose of the criminal action being to induce Marsha Warrington to become the concubine and mistress of Diggs.

At the conclusion of the trial the jury found a verdict of guilty against the defendant on the first count and not guilty on the other three.

II.

CHARGE GIVEN BY JUDGE VAN FLEET TO THE JURY.

The record of the trial in this case has not been printed. Being in typewritten form it is not so easy of access to the judges of this court as if printed. For that reason as well as for others already stated it is deemed proper at this point to give the charge of the trial court stating in the clearest possible language the substantive law involved, and likewise stating the rules proper for the government of the jurors in considering the important questions presented.

A further reason for giving the charge of the trial judge in his own language is that in the 400 page brief of plaintiff in error he has been arraigned and practically charged with grievous error amounting to misconduct in his rulings as shown by his charge and by the admission and exclusion of evidence during the trial.

We herewith give the charge as a clear statement of the law on the subject.

> "Gentlemen of the jury, I ask your careful attention while I submit to you the principles of law that obtain in this case, and when I have done so it will be your duty to observe them and apply them to the evidence for the purpose of reaching your verdict, to the ex-

clusion of any suggestions that may have been made by counsel either here or through the newspapers, or that may have come to your attention from any other source.

The defendant at the bar, F. Drew Caminetti, is on trial under an indictment charging him with a violation of an act of Congress denominated the White Slave Traffic Act, being a statute intended and having the purpose to suppress the transportation in interstate commerce of women for immoral purposes. I shall proceed at once to define and interpret that act to you so far as it is here involved, that is, tell you what it means in its different aspects as applied to the acts charged against this defendant, that being a duty devolving upon the Court under the law; and it will be equally your duty under your oaths to apply such interpretation to the evidence and find your verdict in subordination thereto, even though perchance some one or more of you may entertain the thought that the law should be otherwise. That is to say, it is your duty, equally with mine, to administer the law as we find it, regardless of our individual views or sentiments as to its policy or expediency. I take occasion to emphasize this because of the fact that it has come to your attention during the empanelment of this jury, and perhaps from items appearing in the press, that there exists some diversity of sentiment as to the policy of this statute, as it has been interpreted by the Supreme Court of the United States; but with these diverse views you and I have nothing to do. In my judgment, the act as thus interpreted is a good one, as making in the interests of public morals and decency; but if I thought otherwise it could make no difference to my obligation to do my part toward aiding in its enforcement; and precisely the same obligation rests upon you.

That act, so far as here involved, provides, in substance, that any person who shall knowingly transport or cause to be transported, or aid or assist in obtaining transportation for, or in transporting, in interstate commerce, any woman or girl for the purpose of prostitution or debauchery, or for any other immoral purpose, or with the intent and purpose to induce, entice or compel such woman or girl to become a prostitute, or to give herself up to debauchery, or to engage in any other immoral practice; or who shall persuade, induce or entice, or cause to be persuaded, induced or enticed, or aid or assist in persuading, inducing or enticing, any such woman or girl to be transported in interstate commerce for any such immoral purpose, shall be deemed guilty of a felony, and punished as therein provided.

You will observe that the statute is very comprehensive in its language. It covers several different acts, each one of which is made a criminal offense under its provisions; those here involved being, first, the transporting or aiding in the transportation in interstate commerce of a woman or girl for such immoral purpose or with the intent to induce, entice or compel her to give herself up to such immoral purpose; and, second, the persuading, inducing or enticing any such woman or girl to be so transported in interstate commerce for such immoral purpose. These different acts constitute separate offenses under the statute. Under the first it is an offense to transport or aid in the transportation of such woman or girl for the purpose denounced, whether she goes of her own volition or is induced to go by the means stated in the statute, and whether she is to commit the immoral acts specified with the person so transporting her or with some other person or persons; and under the second phase of the statute above outlined it is an offense

to persuade, induce or entice such female to be so carried or transported for such immoral purpose whether the act of immorality is to be committed with the person so persuading, inducing or enticing her or with another or others.

So far as the several acts charged against the defendant are concerned, it is not essential under the statute that force or compulsion shall be employed to induce or accomplish the transportation of the woman or girl for the purposes there denounced. She may go freely and voluntarily, and even of her own desire, so far as the act of transportation is concerned; in other words, she need not be confined or restrained by physical means to any extent.

It is not necessary that the transportation of the woman or girl be had in company with the person procuring or aiding in its procurement. It is sufficient to constitute the offense that the person charged procured or aided or assisted in procuring such transportation to be accomplished for the purpose denounced in the statute, whether he personally accompanies the woman or girl so transported or not.

As to the second phase of the act above referred to, that of persuading, inducing or enticing, it is not essential to guilt under these terms that any particular means or method shall be employed. The terms persuade, induce and entice are used in the statute in their ordinary popular sense, and imply simply the act of employing the arts of entreaty, allurement, promises or similar means to influence the mind or inclination of the woman or girl and induce her to consent to be transported in interstate commerce for such immoral purpose.

The term interstate commerce, so far as here involved, means transportation or carrying from one state to another, and such transportation may be by means of a railroad or any other

mode of carriage usually employed by common carriers of passengers.

The indictment in this case is framed in four separate counts, which you will find to cover and include the several acts denounced in the statute as I have outlined them above, and charges the acts of the defendant as having relation to two different women or girls, with reference to whom it is charged the statute has been violated by such defendant. The uniting of the several different acts or offenses charged in one pleading or indictment is proper under the Federal statutes.

In the first count of the indictment it is charged that on the 15th day of January, 1913, at Sacramento, in this state, the defendant wilfully, knowingly, and feloniously, unlawfully transported and caused to be transported, and aided and assisted in obtaining transportation for, and in transporting, in interstate commerce, from the City of Sacramento to Reno, in the State of Nevada, over the line of railroad of the Southern Pacific Company, one Lola Norris for the purpose of debauchery and for an immoral purpose, to wit, that said Lola Norris should be and become the concubine and mistress of the defendant.

The second count is a precisely similar charge against the defendant with reference to one Marsha Warrington, the only difference being that the immoral purpose alleged is that the said Marsha Warrington should be and become the concubine and mistress of one Maury I. Diggs.

In the third count it is charged that on that date, at the City of Sacramento, the defendant wilfully, unlawfully, feloniously, and knowingly persuaded, induced and enticed and caused to be persuaded, induced and enticed, and aided and assisted in persuading, inducing and enticing, said Lola Norris to go from said City of Sacramento to said Reno in interstate com-

merce over said line of railroad, for the purpose of debauchery and for an immoral purpose, to wit, that she should be and become the concubine and mistress of the defendant.

And the fourth and last count charges that on that date, at the City of Sacramento, the defendant committed the same act as the last with reference to the girl Marsha Warrington for the immoral purpose that she should be and become the concubine and mistress of said Maury I. Diggs.

The terms concubine and mistress, as employed in the counts of the indictment just read to you, mean, for the purposes of this case, a woman or girl who cohabits with a man without being his wife; a paramour; that is, one who lives with a man and has sexual relations with him, without being his wife; and to constitute which relationship it is not necessary that such cohabitation or living together shall continue during any fixed or definite period of time.

The term debauchery, as used in the statute, and alleged in the indictment, may be best understood by first ascertaining the meaning of the verb. To debauch is to lead away from purity; to corrupt in character or morals; to pollute; to seduce from the paths of virtue. A man debauches a woman when, by insidious approach, through kind attentions, rides, drives, theatres, gentle compliments, protestations of affection accompanied by caresses, or like methods, he first gains her confidence and love, and then, by taking her to questionable resorts, plying her with intoxicating drinks or other similar means, he breaks down her sense of delicacy, perverts her moral nature and arouses her animal passions, and thus seduces her to lewd actions such as illicit sexual relations or commerce. When this result is accomplished it

constitutes debauchery within the meaning of this statute.

And in this connection I instruct you that the purpose for which it is charged in this indictment the transportation of each of these girls was had constitutes debauchery and an immoral purpose within the meaning of the statute in question.

You will furthermore understand that this statute applies alike to married and unmarried men. Both are equally amenable to its provisions, and the degree of responsibility for a violation is the same without reference to their status in that regard.

To this indictment the defendant has interposed a plea of not guilty, which puts in issue the facts alleged in each count of the indictment, and thereby casts upon the Government the burden of proving the material averments of each count as to which it asks a conviction to your satisfaction to a moral certainty and beyond a reasonable doubt,—a term I shall hereafter define to you. It is not essential, however, that the Government establish the truth of the charges contained in all of the counts to entitle you to convict the defendant upon any. You may convict the defendant upon any one or more of the counts of this indictment, or acquit him upon any one or more, as the evidence may warrant under the principles I shall hereafter state to you. In other words, you may convict the defendant upon one or more counts and acquit him upon others accordingly as your judgment, based upon the evidence in the case, may dictate.

And in this connection I should state to you that while the different counts of the indictment allege that the acts therein charged were committed by the defendant on the 15th day of January, 1913, it is not necessary or material that the evidence of the Government shall show

that such acts or any of them were committed on that particular date. It is sufficient under the law if it appear that they were committed at any time within three years prior to the finding of the indictment. The evidence on the part of the Government tends to show that the acts embraced in the several counts were committed in the month of March of the present year, and, the indictment having been found after that date, if the evidence satisfies you in other respects of the guilt of the defendant of any of the acts so charged, the fact that such acts were committed in March instead of January of the present year would not constitute a variance affecting the material rights of the defendant, or prevent you from convicting him thereof.

You will observe that in each count of the indictment the specific purpose and intent of the defendant in committing the particular criminal act therein charged is alleged. The existence of this intent at the time of commiting any of the acts charged is made essential under the statute to constitute an offense, that is, that the act be committed to accomplish the immoral purpose denounced, since there must exist a union of act and intent. It is, therefore, essential to the guilt of the defendant under any one of these counts that you find the existence of this intent at the initiation of any such act. That is one of the substantive elements necessary to constitute a violation of the law in question. The intent need not, however, be formed for any fixed period of time before the act is committed. It is sufficient if it coexists with the commission of the act. The intent or purpose with which a given act is committed, however, need not be shown by any open declaration of the party charged that such was his intent. It may be deduced from the circumstances shown in the evidence, including all

the acts done or statements made by the defendant, either orally or in writing, and by the acts and declarations in his presence of those, if any, concerned with him in carrying out the transaction. In other words, it is to be gathered by the jury from these sources by applying their reason and judgment to the evidence and making the deductions therefrom which men of ordinary experience and observation in the affairs of life would naturally draw. When the intent is thus made manifest, and the jury are able to so find, it satisfies the law and is sufficient, if the other elements are shown, to sustain guilt. Of course, it is an inference or deduction but it is a very usual and proper one. Indeed, if such were not the law it would be rare that the specific intent of a defendant in doing a particular act could be established. Men committing a wrongful act do not ordinarily proclaim in any open, definite manner the real purpose or intent with which the act is done, and, therefore, unless it could be inferred from the circumstances surrounding it, the real intent could in most instances not be established.

As I have heretofore intimated in your presence during the course of this trial, it is immaterial under the statute here involved what the character of the two girls involved in these charges was at the time of the acts charged, so long as the intent with which such acts were done is shown to the satisfaction of the jury; that is to say, if it appears in this case to your satisfaction that the defendant committed the acts charged in any one or more of these counts for the purpose alleged therein, it is wholly immaterial, except in so far as it may affect your consideration of her testimony, or the motive with which she was intended to be transported, whether the woman or girl involved in the particular charge was at the time

a lewd or immoral woman or a woman of chaste character. In other words, the act in question denounces the carrying in interstate commerce, for the immoral purposes specified, of any woman or girl, and a defendant violates the act when he does any of the things prohibited thereby, regardless of the fact as to whether the woman or girl who is the subject of his act be lewd or chaste, or whether or not he has himself previously had illicit intercourse with her. The act is intended primarily to suppress the traffic against which it is aimed, and incidentally is intended as much for the protection from further temptation and wrong of women or girls who have already entered upon or been seduced to a lewd course as for those whose lives have previously been innocent of wrong.

The burden of proof in this case, as in all other criminal prosecutions, is upon the Government, and it is not necessary for a defendant to offer evidence in disproof of any allegation of the indictment until the facts proven, if unrefuted by him, are sufficient to establish his guilt. The law, in its charity, presumes the innocence of a defendant, and that presumption abides with him throughout the trial and until his guilt is established by the evidence. The showing of a mere probability of guilt is not sufficient. Before a conviction may be had it is incumbent upon the Government to prove the guilt of a defendant by evidence which, as I have heretofore stated, satisfies the minds of the jury beyond a reasonable doubt, and that means by evidence which satisfies their minds to a moral certainty, and which accords with their reason and judgment to an extent which would induce them to act in the important affairs of life. As a great jurist has well expressed it, a reasonable doubt arises when the jury, after a fair and impartial consideration

of all the evidence in the case, are unable to say that they feel an abiding conviction to a moral certainty of the truth of the charge; a certainty which satisfies the reason and directs the understanding of those who are bound to act conscientiously upon it. If, therefore, after a full consideration of the evidence presented, the jury are conscientiously able to say that they entertain such a doubt as to the guilt of the defendant under any count of this indictment, they must resolve that doubt in his favor by an acquittal as to such count; and, of course, if you entertain such doubt as to all the counts, then you should acquit him on all. This applies to the jury as a whole and to each member of it, since in a criminal case the verdict must be unanimous; and this degree of proof must obtain as to each independent fact or circumstance relied upon to show guilt; that is, each essential fact or circumstance in a chain necessary to establish guilt must be sustained to the same degree of certainty, since a chain is truly said to be no stronger than its weakest link.

And where circumstantial evidence is relied upon in whole or in part for a conviction, such circumstances should not only be in harmony with the guilt of the accused, but they must be such that they cannot reasonably be true in the ordinary course of things and the defendant be innocent.

But you will not understand from this that the Government is called upon, under any of these counts, to make a case free from any possible doubt, that is, to prove the defendant's guilt to an unassailable demonstration. Such is not the law, for such proof is rarely obtainable in dealing with human transactions. In other words, the doubt which will justify your hesitation must be based in reason and arise upon the evidence and not consist of a mere fanciful hesitation growing out of your sym-

pathies, or based upon something other than a fair and impartial consideration of the evidence in the case.

As I believe I stated to you early in the trial, the fact that an indictment is brought against a defendant constitutes no evidence of his guilt. That is merely a formal instrumentality provided by the law as a means of bringing a defendant to trial, and subserves such purpose alone.

In determining the guilt of the defendant you may consider the fact that the law presumes a defendant to have a fair character for the traits involved in the charge until the evidence has established the contrary, and this presumption of good character goes in aid of the presumption of innocence and is to be considered by you with the evidence in the case in determining the guilt or innocence of the defendant. It is an element tending to some degree to show innocence, since the law presumes that a man of good character will not as readily engage in a criminal enterprise as one who is shown to have had a previous bad character. You should therefore give this presumption due consideration with the other evidence in the case in determining the defendant's guilt; but you will understand that notwithstanding the fact that his character is presumed to be good, such fact should not deter you from finding a verdict adversely to him under this indictment if you are satisfied from the evidence as a whole, after giving due consideration to such presumption, that his guilt has nevertheless been established.

While, as I have stated, it is the duty of the Court to declare the law and that of the jury to be governed by it in their consideration of the evidence, it is, on the other hand, the province and right of the jury to pass upon the facts in the case and the credibility of the witnesses.

With those functions the Court has nothing to do, other than to endeavor to see that only proper evidence is permitted to go before the jury for their consideration; and it is neither the right nor the disposition of the Court to interfere with that duty of the jury. If, therefore, during the progress of this trial you have gathered or during this charge should gather any impression from anything which the Court may have uttered in your presence, as to the views or judgment of the Court on the question of the defendant's guilt or innocence, or as to the weight of any evidence or the credibility of any witness, you will disregard such impression, should it not accord with your own views, and base your finding upon your own independent judgment as to what the sum of the evidence discloses; and when I refer to the evidence I refer solely to such evidence as has been finally permitted to go in and remain before you for your consideration. And in this connection I should suggest to you, gentlemen, that the statements or declarations of counsel made at the bar are in no sense evidence for your consideration. You are to confine your consideration alone to the evidence that has been admitted before you from the witness stand or in the way of exhibits or other physical objects which may have been laid before you.

In determining the credibility of a witness you will bear in mind that every witness is presumed to speak the truth; but this presumption may be overcome by the manner in which he testifies or the character of his testimony. The jury should take into consideration his character and conduct as disclosed, his relation to the controversy and to the parties, if any, his expressed or apparent bias or partiality, the reasonableness or unreasonableness of the statements he makes, and all other elements which tend to throw light upon his credibility. The

manner of the witness is to be observed, and the testimony he gives tested by the rules of reason and common sense. You note how far his evidence accords with the other facts as proven in the case; how far it is inconsistent with those facts, how far it is probable or improbable in itself or when viewed in the light of the other evidence on the question as to which the testimony of the witness has been addressed, and from all these considerations you determine the weight which you will give to his statements. The fact that a witness appears to be merely mistaken as to some feature of his evidence does not necessarily discredit him in other respects, although it may properly make you more careful in the consideration of the other features of his testimony; but if a witness comes upon the stand and testifies to what you believe, in view of the other evidence in the case, to be a deliberate falsehood, uttered with an intent to deceive, then you have a right, in your wisdom, to discredit all his testimony and to discard it from your consideration, unless the other evidence in the case satisfies you that in some respects he has told the truth. This applies to all the witnesses alike.

Where a defendant takes the witness stand, his evidence is to be judged by the same rules which are applied in determining the credibility of any other witness. That is, he is not to be discredited merely upon the ground that he is the defendant. You are to accord him the same fair and impartial consideration of his testimony, when viewed in the light of all the other facts in the case, as you would the testimony of a witness standing in any other relation to the case; but in passing upon his credibility you have a right, precisely as with any other witness, to consider the interest he has in the result of the trial, and determine for yourselves how far that interest may have

tended to color his statements or cause him to deviate from the truth. If, when tested by these rules, his testimony does not accord with your reason as being true, then you are not required to believe it.

Where a witness testifies to statements or verbal declarations or admissions of a defendant or of another witness, purporting to have been made on some occasion previous to, and more or less remote from, the trial, you have a right, in determining the weight you will give to such testimony, to consider with the matters I have heretofore stated to you the length of time elapsing since such statements are testified to have been made, whether the memory of the witness with reference thereto appears to be clear and well-preserved, or otherwise, and whether he was at the time such declarations are claimed to have been made in a position to hear and fully apprehend their true import and meaning, and any other attendant circumstance which would be calculated to throw light upon the correctness of his evidence.

In other words, in this, as in all other respects in your examination of the evidence of the different witnesses, you are to consider it from a reasonable, sensible, every day point of view, so to speak. You should be neither too credulous nor too skeptical in your attitude of mind. An eminent writer upon the law of evidence has aptly said that unbounded credulity is the attribute of weak minds that never thing or reason at all; while unlimited skepticism belongs only to those who make their own knowledge and observation the exclusive standard of probability. You should avoid both of these extremes, and give your judgment as the result of your intelligent discrimination as reasonable and practical men.

Where the facts in a case are equally open to two reasonable constructions, one favorable and

the other unfavorable to the defendant, the jury should adopt that construction which is favorable to the defendant rather than that which is against him; and when an act shown to have been committed by a defendant is capable of two constructions, one consistent with his innocence and the other tending to establish his guilt, the jury should adopt the construction consistent with his innocence. These principles have their basis in that same rule of charity which gives rise to the presumption of innocence. But these principles do not require the jury to ignore the obvious, natural and reasonable tendencies of the evidence, and if, giving the defendant their full benefit, you are nevertheless satisfied, upon a consideration of the entire case, of his guilt, it will be your duty to unhesitatingly so declare by your verdict.

In view of the fact that the two young women, Lola Norris and Marsha Warrington, who are involved in the charge against the defendant, have been referred to several times during the trial as prosecuting witnesses, I should state to you that this prosecution is not being carried on by these young women or either of them. This prosecution is in no aspect a private one, but is instituted and being carried on by the United States Government for the purpose of vindicating the law which it claims has been violated, and with a purpose of punishing the defendant for such violation if the jury shall find that he has been guilty thereof, and of having such punishment operate as a deterrent in preventing others from violating the statute in question. While the witnesses Lola Norris and Marsha Warrington have testified in support of the Government's case, their evidence was given by them merely as witnesses and not as prosecutors of the indictment.

You will bear the principles I have stated in mind and apply them to the evidence in the case in determining the guilt or innocence of the defendant under the several counts of the indictment.

As I have indicated to counsel in passing upon the defendant's motion to instruct the jury to acquit, the evidence introduced before you by the Government, if believed by you, is sufficient in its legal aspects, that is, in law, to make a case against the defendant under each one of those counts, but whether it is such as to satisfy you of its truth and establish the guilt of the defendant to the degree I have indicated is, as I have heretofore stated, a question solely for your consideration.

As has been stated to you by defendant's counsel in their argument, one of the most material facts left in this case for your determination in reaching a verdict is as to the purpose or intent with which these girls were transported to Reno on the occasion in question, should you find that they were so transported. Upon this question the defendant has introduced the evidence of several witnesses, and has himself testified, to facts tending to show certain threats emanating from the father of Maury I. Diggs, and the wife of the latter, and others, and communicated to himself and his companion Diggs, from which it is claimed that their sole actuating motive in leaving Sacramento was to escape arrest and exposure and possible personal violence at the hands of the father of one of the girls. This evidence is all before you for your consideration in connection with the other evidence in the case bearing upon that subject. The defendant, however, in his testimony, did not in any express or direct way touch upon the Reno trip, or specifically state what his purpose or intent was in taking these girls, or either of them, with him, if you

find they were so taken; nor has he testified as to what the facts or incidents of that trip were,—confining himself to a statement of certain things occurring before that trip was taken, and their effect upon his state of mind. Now it was the defendant's privilege to thus limit his testimony, and, being a defendant, he could not be required to say more if it was not his desire to do so; nor could he be asked in cross-examination as to matters not covered by his direct testimony. But in passing upon the evidence in the case for the purpose of finding the facts, you have a right, as has been stated to you by counsel for the Government, to take this omission of the defendant into consideration. A defendant is not required under the law to take the witness stand. He cannot be compelled to testify at all, and if he fails to do so no inference unfavorable to him may be drawn from that fact, nor is the prosecution permitted in that case to comment unfavorably upon his silence; but where a defendant elects to go upon the witness stand and testify, he then subjects himself to the same rule that applies to any other witness, and if he has failed to deny or explain acts of an incriminating nature that the evidence of the prosecution tends to establish against him, such failure may not only be commented upon, but may be considered by the jury in connection with all the other circumstances in reaching their conclusion as to his guilt or innocence.

If, therefore, you find that these girls were transported to Reno by the defendant and his companion Diggs in the manner claimed by the prosecution, and the evidence in behalf of the defendant as to the motive or intent with which such transportation was had is not such as appeals to your hard, practical reason and common sense, in the light of all the other evidence and when all the acts of the defendant are con-

sidered, you are not compelled to believe it. As aptly suggested by one of defendant's counsel in his argument, there is a homely adage that actions speak louder than words; and the truth of this is quite as pertinent in its application to judicial inquiries as in the ordinary affairs of life. If, therefore, you find that these girls were taken to Reno on the occasion in question as testified to by them, and that while there the defendant and his companion Diggs cohabited with them in the manner stated, then you may find that they were taken there with such purpose and intent. That is, if the evidence on behalf of the defendant as to his actuating motive in taking these girls with him on that occasion does not accord with his acts, you may discard that evidence if it does not carry conviction to your minds and base your finding as to his intent upon the acts committed by him.

And even should you find that the defendant and his companion Diggs were actuated in their departure or flight from Sacramento by a fear of exposure or arrest, but that nevertheless in taking these two girls with them there existed the intention to subject them to the immoral purpose charged, then you will be justified in finding the defendant guilty. If that immoral purpose was one motive inducing him to take these girls with him, it would matter not that he may also have been actuated by his fears or other consideration moving him to take that trip; he would nevertheless be guilty.

As to the question, which has been argued by counsel, whether the evidence is sufficient to show that the defendant transported or aided or assisted in transporting these girls to Reno, you will understand that it is not necessary to sustain this charge that the defendant be shown to have himself paid for the tickets or other expenses of that trip. If he contributed to the

means for paying such expenses, or if it was understood between himself and Diggs that he was thereafter to contribute thereto by reimbursing Diggs, this would be sufficient upon which to sustain the charge that the defendant aided and assisted in such transportation.

Now, gentlemen, with these suggestions I submit this case to you. My duty is finished and the case rests in your hands. Perhaps I should again admonish you that to no extent must you permit yourselves to be influenced in your verdict by the fact that this case has attracted great public attention and given rise to so much controversy in the public press, the halls of Congress, and among the people prior to this trial by reason of certain incidents arising in its earlier history. Those facts are wholly extraneous to your inquiry or mine, and we have nothing whatsoever to do with them. They in no way affect the merits of the case, and you should be careful to avoid permitting any feeling of bias or prejudice arising therefrom to find reflection in your verdict.

And moreover, as I have suggested to you during the progress of the trial, you should be careful to avoid permitting any comments that may have been made in the newspapers during the progress of this case, and which may have fallen under your observation, to influence your verdict to any extent. It matters not what the nature of such comment may have been—whether it had relation to the appearance, manner, or testimony of the defendant or of a witness, or as to a ruling of the Court. The witnesses and their credibility are to be judged solely by the principles that I have stated to you, independently of any such comment; and the rulings of the Court, if in any wise erroneous, are to be reviewed only in a proper tribunal. For the purposes of the verdict you are to assume that those rulings have been made in

subordination to the rules of evidence or other principles of law affecting the particular question under consideration, and confine your consideration solely to the determination whether under the sworn evidence, and the law as administered by the Court, the defendant is innocent or guilty.

And in this connection, gentlemen of the jury, perhaps I should suggest to you, although I doubt if it is absolutely necessary, that you must refrain from permitting your verdict to be tinctured to the slightest extent by any of those natural feelings of sympathy which may arise out of consideration of the fact that this defendant may have relatives whose sorrow will be elicited in the event that he is convicted or whose joy will be brought about in the event of his acquittal. We are all subject to such sentiments. I doubt if any of you have them more deeply imbedded in your makeup than myself but I cannot permit myself to be actuated by them nor can you to any extent whatsoever without abandoning the principles upon which we are bound to proceed and decide this case.

Now, gentlemen of the jury, in accordance with the principles I have suggested to you, and in view of the fact that the indictment contains several counts, the Clerk will have prepared different forms of verdict, which you will find to meet your necessities. Should your consideration of the evidence result in your finding this defendant guilty upon each and all of these counts, then you may find a general form of verdict, simply stating that you find the defendant guilty as charged. That will imply a finding of guilt upon each and all of the counts in the indictment. Should you in your wisdom reach the conclusion that the defendant is guilty upon certain counts in the indictment and not guilty as to others then there is

a form which affords an opportunity to express such verdict. Should you agree as to the guilt or innocence of the defendant upon one or more counts, but be unable to reach an agreement as to others, then you may return a verdict as to those counts upon which you so agree and report your inability to agree as to the others. And, of course, as I have heretofore stated, should you entertain a reasonable doubt as to the guilt of the defendant under any one or more of those counts, or all of them, then you must give him the benefit of such doubt by your verdict."

III.

THE WHITE SLAVE TRAFFIC ACT WAS A CONSTITUTIONAL EXERCISE OF POWER BY THE CONGRESS OF THE UNITED STATES.

The statute known as the "White Slave Traffic Act" is correctly set out as an appendix to the brief of plaintiff in error. It was passed on the 25th of June, 1910.

The leading case on the subject of the power of Congress to enact the so-called White Slave Traffic Act is *United States v. Hoke,* originally determined on April 6, 1911, by the District Court of the Eastern District of Texas. The matter as there presented is thus referred to by the Court Reporter, 187 Fed. 993:

> "Effie Hoke and another were indicted for alleged violation of Act of Congress, June 25, 1910, c. 395, 36 Stat. 825, prohibiting the furnishing of transportation for or the persuading,

enticing, or inducing of a woman to go from one state to another as a passenger in interstate commerce for immoral purposes."

In his opinion, Russell, District Judge, says:

"The indictment under consideration was drawn under the act of June 25, 1910, c. 395, 36 Stat. 825, which sought to make it a felony to furnish transportation or to persuade, entice, or induce a woman or girl to go from one state to another as a passenger in interstate commerce for the purpose of prostitution or debauchery, where the furnishing of such transportation or the inducement, persuasion, or enticement aforesaid is followed by the woman actually being transported in interstate commerce for the purpose of prostitution or debauchery.

(4) The demurrers of the defendants in this case assailed the sufficiency of the indictment, among other reasons, upon the ground that the act of Congress under which the indictment was drawn was an unconstitutional exercise of power. It is contended by defendants that no power was granted to Congress by the Constitution to enact legislation of the character in question, and this contention brings sharply before the court the duty of deciding whether the act of June 25, 1910, is constitutional.

The power of Congress to pass this legislation must be found in two articles of the federal Constitution:

'Congress shall have power * * * to regulate commerce with foreign nations, and among the several states, and with the Indian tribes. * * *

'Congress shall have the power to pass all laws which are necessary and proper for carrying into execution the foregoing powers, and

all other powers vested by this Constitution in the government of the United States or in any department thereof.' Article I, Sec. 8.

Upon these two clauses of the Constitution must depend the power of Congress to pass the act under which the indictment in this case was drawn."

The matter was determined by the Supreme Court of the United States on appeal on January 24, 1913, 227 U. S. 308, 326; 57 Law. Ed. 523, the opinion in the case and in several kindred cases, being by Mr. Justice McKenna of that court.

In the course of the opinion, the following language is found (525 Law. Ed.):

"The charge against Effie Hoke is that she did, on the 14th day of November, A. D. 1910, in the city of New Orleans and state of Louisiana, unlawfully, feloniously, and knowingly persuade, induce and entice one Annette Baden, alias Annette Hays, a woman, to go from New Orleans, a city in the state of Louisiana, to Beaumont, a city in the state of Texas, in interstate commerce, for the purpose of prostitution.

The charge against Basile Economides is that he did unlawfully, feloniously, and knowingly aid and assist the said Effie Hoke to persuade, induce, and entice the said Annette Baden * * * to go in interstate commerce * * * for the purpose of prostitution, * * * in the said city of Beaumont, Texas.

The second and third counts make the same charge against the defendants as to another woman, the one named in the third count being under eighteen years.

The demurrers were overruled, and after trial the defendants were convicted and sentenced, each to two years' imprisonment on each count. 187 Fed. 992."

After quoting the language of the several sections of the statute, Mr. Justice McKenna, speaking for an undivided court, says:

> "The power of Congress under the commerce clause of the Constitution is the ultimate determining question. If the statute be a valid exercise of that power, how it may affect persons or states is not material to be considered. It is the supreme law of the land, and persons and states are subject to it.
>
> Congress is given power 'to regulate commerce with foreign nations and among the several states'. The power is direct; there is no word of limitation in it, and its broad and universal scope has been so often declared as to make repetition unnecessary. And, besides, it has had so much illustration by cases that it would seem as if there could be no instance of its exercise that does not find an admitted example in some one of them. Experience, however, is the other way, and in almost every instance of the exercise of the power differences are asserted from previous exercises of it and made a ground of attack. The present case is an example.
>
> Commerce among the states, we have said, consists of intercourse and traffic between their citizens, and includes the transportation of persons and property. There may be, therefore, a movement of persons as well as of property; that is, a person may move, or be moved in interstate commerce. And the act under consideration was drawn in view of that possibility. What the act condemns is transportation obtained or aided, or transportation induced, in interstate commerce, for the immoral purposes mentioned. But an objection is made and urged with earnestness. It is said that it is the right and privilege of a person to move between states, and that such

being the right, another cannot be made guilty of the crime of inducing or assisting or aiding in the exercise of it, and 'that the motive or intention of the passenger, either before beginning the journey, or during or after completing it, is not a matter of interstate commerce'. The contentions confound things important to be distinguished. It urges a right exercised in morality to sustain a right to be exercised in immorality. It is the same right which attacked the law of Congress which prohibits the carrying of obscene literature and articles designed for indecent and immoral use from one state to another. 29 Stat. at L. 512, chap. 172, U. S. Comp. Stat. 1901, p. 3180; United States v. Popper, 98 Fed. 423. It is the same right which was excluded as an element as affecting the constitutionality of the act for the suppression of lottery traffic through national and interstate commerce. Lottery Case (Champion v. Ames) 188 U. S. 321, 357, 47 L. ed. 492, 501, 23 Sup. Ct. Rep. 321, 13 Am. Crim. Rep. 561. It is the right given for beneficial exercise which is attempted to be perverted to and justify baneful exercise, as in the instances stated, and which finds further illustration in Reid v. Colorado, 187 U. S. 137, 47 L. ed. 108, 23 Sup. Ct. Rep. 92, 12 Am. Crim. Rep. 506. This constitutes the supreme fallacy of plaintiffs' error. It pervades and vitiates their contentions.

Plaintiffs in error admit that the states may control the immoralities of its citizens. Indeed, this is their chief insistence; and they especially condemn the act under review as a subterfuge and an attempt to interfere with the police power of the states to regulate the morals of their citizens, and assert that it is in consequence an invasion of the reserved powers of the states. There is unquestionably a control in the states over the morals of their citizens,

and, it may be admitted, it extends to making prostitution a crime. It is a control, however, which can be exercised only within the jurisdiction of the states, but there is a domain which the states cannot reach and over which Congress alone has power; and if such power be exerted to control what the states cannot, it is an argument for—not against—its legality. Its exertion does not encroach upon the jurisdiction of the states. We have cited examples; others may be adduced. The pure food and drugs act is a conspicuous instance. In all of the instances a clash of national legislation with the power of the states was urged, and in all rejected.

Our dual form of government has its perplexities, state and nation having different spheres of jurisdiction, as we have said; but it must be kept in mind that we are one people; and the powers reserved to the states and those conferred on the nation are adapted to be exercised, whether independently or concurrently, to promote the general welfare, material and moral. This is the effect of the decisions; and surely, if the facility of interstate transportation can be taken away from the demoralization of lotteries, the debasement of obscene literature, the contagion of diseased cattle or persons, the impurity of food and drugs, the like facility can be taken away from the systematic enticement to and the enslavement in prostitution and debauchery of women, and more insistently, of girls.

This is the aim of the law, expressed in broad generalization; and motives are made of determining consequence. Motives executed by actions may make it the concern of government to exert its powers. Right purpose and fair trading need no restrictive regulation, but let them be transgressed, and penalties and prohibitions must be applied. We may illustrate

again by the pure food and drugs act. Let an article be debased by adulteration, let it be misrepresented by false branding, and Congress may exercise its prohibitive power. It may be that Congress could not prohibit the manufacture of the article in a state. It may be that Congress could not prohibit in all of its conditions its sale within a state. But Congress may prohibit its transportation between the states, and by that means defeat the motive and evils of its manufacture. How far-reaching are the power and the means which may be used to secure its complete exercise we have expressed in Hipolite Egg Co. v. United States, 220 U. S. 45, 55 L. ed. 364, 31 Sup. Ct. Rep. 364. There, in emphasis of the purpose of the law, are denominated adulterated articles as 'outlaws of commerce', and said that the confiscation of them enjoined by the law was appropriate to the right to bar them from interstate transportation, and completed the purpose of the law by not merely preventing their physical movement, but preventing trade in them betwen the states. It was urged in that case, as it is urged here, that the law was an invasion of the power of the states.

Of course it will be said that women are not articles of merchandise, but this does not affect the analogy of the cases; the substance of the congressional power is the same, only the manner of its exercise must be accommodated to the difference in its objects. It is misleading to say that men and women have rights. Their rights cannot fortify or sanction their wrongs; and if they employ interstate transportation as a facility of their wrongs, it may be forbidden to them to the extent of the act of June 25, 1910, and we need go no farther in the present case.

The principle established by the cases is the simple one, when rid of confusing and distract-

ing considerations, that Congress has power over transportation 'among the several states'; that the power is complete in itself, and that Congress, as an incident to it, may adopt not only means necessary but convenient to its exercise, and the means may have the quality of police regulations. Gloucester Ferry Co. v. Pennsylvania, 114 U. S. 196, 215, 29 L. ed. 158, 166, I Inters. Com. Rep. 382, 5 Sup. Ct. Rep. 826; Cooley, Const. Lim. 7th ed. 856. We have no hesitation, therefore, in pronouncing the act of June 25, 1910, a legal exercise of the power of Congress."

The Supreme Court of the United States affirmed the judgment of conviction. Following its judgment, a petition for rehearing was filed by distinguished counsel for the plaintiffs in error, in which the following positions were taken:

"Having carefully examined the opinion of the Honorable Court, we think that, with propriety, we may ask the court to consider whether this case be not one in which it will be proper to grant a rehearing to the plaintiffs in error on the following grounds, briefly treating of the constitutionality of the White Slave Act under which these plaintiffs in error were convicted, and confining our petition for a rehearing on the facts to the matters complained of in plaintiffs' in error's brief. * * *

Article IV, Section 2, of the Constitution of the United States, reads:

'The citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.'

The White Slave Act is contrary to and contravenes this provision of the Constitution in that though they are generally and justly deemed immoral, yet prostitutes, both male and

female, are citizens of their respective States with all the 'privileges and immunities' possessed by any other citizen; and one of their 'privileges' is to travel interstate; and so long as this privilege exists as a lawful right, it is the 'privilege' and lawful right of any other citizen to aid and assist, persuade and entice, them to take the journey, regardless of their motive or purpose and regardless of the motive and purpose of the one rendering the aid, as to what they shall do or intend to do at the end of their journey.

Article I, Section 8, Subdivision 2, of the Constitution of the United States, reads:

'The Congress shall have Power "To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes".'

The White Slave Act is unconstitutional in that it does not come within the terms of this provision of the Constitution, for the reason that while the carrying of passengers interstate comes within 'the power to regulate commerce', the motive or intent of the passenger either before beginning the journey, or during, or after completing it, is not a matter of interstate commerce.

In the opinion of this Honorable Court, we are cited to the case of the United States vs. Popper, 98 Fed. 423, holding that Congress has the power to prohibit the carrying of obscene literature and articles designed for indecent and immoral use from one State to another; and to the case of Champion vs. Ames, 188 U. S. 321, 357, holding that Congress has the power to suppress the traffic in lottery tickets through national and interstate commerce. Also reference is made to the Pure Food and Drugs Act. In each of these instances Congress has dealt with the visible, tangible and corporeal thing, and has regulated and controlled the movement, in

interstate commerce of an object or objects having a physical existence.

Under the provisions of the White Slave Act, Congress is regulating and controlling the animus of the citizens of the several States while journeying in interstate travel, or before commencing the trip, or after completing it, and is, therefore, governing and regulating the transportation of an intangible and incorporeal thing, not perceptible to the touch, which cannot be a matter of interstate commerce. Under this Act, Congress is controlling matters in contemplation, or in the minds of the persons affected, and not *in esse*.

The Act is void in that it conflicts with the reserved police powers of the States individually to regulate or prohibit prostitution or any other immoralities of their citizens.

The Amendments IX and X to the United States Constitution were intended as emphasizing the retention of reserved powers to the States in all cases save those which expressly delegated powers to Congress.

The Congress of these United States, as a legislative body, is one of limited powers prescribed by the Constitution, and can pass no valid enactment unless it comes strictly within some one or more of the provisions conferring the power; and that all powers not so expressly granted to Congress, by the Constitution, were reserved to the States individually.

When the States granted the power to Congress 'to regulate commerce between the States' it was intended as a strict limitation to regulating commerce as such and as the common understanding would interpret it, and they did not intend that it should ever be extended by implication into interfering with, regulating or aiding the reserved police powers. It is no argument to say the States individually could not forbid an interstate journey to prostitutes,

or to those aiding or assisting in such journey, for the simple reason that each State has the power absolutely to suppress prostitution within its borders, even to the radical extent of making it a capital felony; and to say the State has no such power to prohibit such interstate carriage of prostitutes is but a further exposure of the object of the bill to interfere with the police power of the States to regulate the morals of their citizens. Chief Justice Fuller speaking for the Court in United States vs. Knight Co., 156 U. S. 12, 39 L. Ed. 329, says:

'That which belongs to commerce is within the jurisdiction of the United States, but that which does not belong to commerce is within the jurisdiction of the police powers of the State.'

We, therefore, submit the proposition that, under our view, the Act is unconstitutional, and should be so held by the Court."

Notwithstanding this persistent suggestion that the act was unconstitutional, rehearing was denied and the opinion announced by Mr. Justice McKenna has become not only the declared, but the established law of this country.

On the same day on which the Supreme Court of the United States disposed of the case of *Hoke v. United States,* several other decisions were made with reference to charges under the same White Slave Traffic Act.

The cases were:

Athanasaw v. United States, 227 U. S. 336;
Bennett v. United States, 227 U. S. 333;
Harris v. United States, 227 U. S. 340.

The opinion in each case was by Mr. Justice McKenna. In each case the constitutionality of the statute was upheld. We ask attention to some of the expressions in the *Athanasaw* case, reported in 57 Law. Ed. 528, 531. At page 530 the court says:

> "Three propositions are presented by defendants: (1) The gist of the offense is the intention of the person when the transportation was procured or aided to be procured. (2) The word 'debauchery', as used in the statute, means sexual intercourse. (3) The act did not intend to prohibit the transportation of women for the purpose of any other vice or immorality than that applicable to sexual actions.
>
> The instructions requested by the defendants presented these propositions, and by refusing them and giving others inconsistent with them it is contended that the court erred. The ruling of the court is sufficiently exhibited by the instructions which it gave, and they can be made the basis as well of a consideration of the errors assigned by the refusal of the instructions requested by defendants.
>
> The instructions given by the court are as follows:
>
> 'The intent and purpose of the defendants at the time of the furnishing of this transportation for Agnes Couch is the very gist and question in this case. Did they intend to induce or entice or influence her to give herself up to debauchery? It makes no difference whether the profits which would be made by the defendants came from the sale of liquor or other immoral purpose. The question here is of intent; what was the intent with which they brought her; that she should live an honest, moral and proper life? or that she came and they engaged and contracted with her for the purpose of her entering upon a condition which might be termed

debauchery, or lead to or would necessarily and naturally lead her to, a condition of debauchery just referred to?

The term "debauchery" is not a legal or technical term. There is no allegation that the defendants brought here here with the purpose or with the intent to debauch her; but to induce her, or entice her, or influence her to enter upon a course of debauchery. The term "debauchery" is not a legal or technical term. To debauch is to corrupt in morals or principles; to lead astray morally into dishonest and vicious practices; to corrupt; to lead into unchastity; to debauch. Debauchery, then, is an excessive indulgence of the body; licentiousness, drunkenness, corruption of innocence, taking up vicious habits. The term "debauchery", as used in this statute, has an idea of sexual immorality; that is, it has the idea of a life which will lead eventually, or tends to lead, to sexual immorality; not necessarily drunkenness or immorality; but here it leads to the question in this case as to whether or not the influences in which this girl was surrounded by the employment which they called her to did not tend to induce her to give herself up to a condition of debauchery which eventually, necessarily, and naturally would lead to a course of immorality sexually. That is the question for you to determine, and it is a question that you alone can determine. You have heard the testimony in the case in regard to the circumstances in which she was placed. You have viewed the scene where she was employed. You have examined by the testimony and your observation what was the character and what was the condition or influence in which the girl was placed by the defendant. Was or was not it a condition that would necessarily and naturally lead to a life of debauchery of a carnal nature relating to sexual intercourse between man and woman?

Now, it is contended that they must have had a deliberate intent to debauch her when she came here; that either one or the other intended to debauch her or to get somebody else to debauch her. Now, that term debauch is used in a great many instances in the law, and the usual connection is to have carnal intercourse with; but there is no such language in this statute, nor is it the language of the indictment. The charge of the indictment in substance is that they induced or influenced her to enter into a life or condition of debauchery,—"to induce or compel her to give herself up to debauchery." '

The language of the statute is directed against the transportation 'of any woman or girl for the purpose of prostitution or debauchery, or *for any other immoral purpose,* or with the intent and purpose to induce, entice, or compel such woman or girl to become a prostitute or to give herself up to debauchery, or to engage in any other immoral practice'.

The instructions of the court were justified by the statute. It is true that the court did not give to the word debauchery or to the purpose of the statute the limited definition and extent contended for by the defendants, nor did the court make the guilt of the defendants to depend upon having the intent themselves to debauch the girl or to intend that some one else should do so. In the view of the court the statute has a more comprehensive prohibition, and was designed to reach acts which might ultimately lead to that phase of debauchery which consisted in 'sexual actions'. The general expressions of the court, however, were qualified to meet and not go beyond the conduct of the defendants. The court put it to the jury to consider whether the employment to which the defendants called the girl and the influences with which they surrounded her tended 'to induce her to give herself up to a condition of de-

bauchery which eventually and naturally would lead to a course of immorality sexually'. That question, the court said, the jury should determine, and further: 'You have heard the testimony in the case in regard to the circumstances in which she was placed. You have viewed the scene where she was employed. You have examined by the testimony and your observation what was the character and what was the condition or influence in which the girl was placed by the defendants. Was or was not it a condition that would necessarily and naturally lead to a life of debauchery of a carnal nature relating to sexual intercourse between man and woman?' The plan and place justified the instructions. The plan might have succeeded if the coarse precipitancy of one of the defendants and the ribaldry of the habitues of the place had not shocked the modesty of the girl. And granting the testimony to be true, of which the jury was the judge, the employment to which she was enticed was an efficient school of debauchery of the special immorality which defendants contend the statute was designed to cover."

In considering the matter we ask the court to bear in mind that the title of the statute is much broader than section eight. The title is as follows: "An Act to Further Regulate Interstate and Foreign Commerce by Prohibiting the Transportation Therein for Immoral Purposes of Women and Girls and for Other Purposes." The language could not well be broader.

Counsel for plaintiff in error, at some length, call attention to the fact that the author or sponsor for this statute, Representative Mann, apparently dis-

agrees with the several judgments reached by the Supreme Court with reference to the purpose of Congress in the enactment of this law.

The matter under discussion in the House of Representatives when the report of the Mann Committee was made was more particularly the power of Congress to enact legislation on this subject, in view of the powers of the states to originate police legislation. But in the reports in the House of Representatives, reference is made to the case of *United States v. Bitty,* reported first in 155 Fed. 938, and subsequently reported on appeal in 208 U. S. 393; 52 Law Ed. 543, 547.

The position taken by the accused in the case at bar was identical in that case with the position taken by District Judge Hough of the Circuit Court for the Southern District of New York, when he announced his decision on December 10, 1907. The act there involved was not the so-called White Slave Traffic Act, but the Immigration Law. At pages 939-940 (155 Fed.) the judge used this language:

> "It may be that, as the court remarked in the case cited, this defendant is guilty of an open violation of the divine law and of grossly immoral acts, so that such a case is not 'the most favorable for a dispassionate consideration of questions of law, the decision of which involves the question whether the party defendant shall be punished, or discharged as not guilty of any offense cognizable by the statute'. It is, however, necessary to apply to this statute, as to any other, the ordinary rules of con-

struction, concerning which the discussion at bar has not revealed any substantial difference of opinion between opposing counsel.

It may be admitted that the immigration act of 1907 is in its general scheme remedial; and it is not denied that it is the duty of the court to give to each intelligible word of the statute its exact and precise meaning according to common understanding of the intent of the Legislature, so far as ascertainable from legal sources; and that intent, if expressed in apt language, must be enforced as long as the statute is in operation, though the result be cruel or ridiculous. So far as this statute is concerned I have been directed to no indication of legislative intent other than the language of the statute itself, except the report of the committee of the House of Representatives on immigration, made to the Fifty-ninth Congress at its first session (No. 4,912), wherein it is stated that the scope of section 3 of this statute is extended beyond that of the corresponding section of the act of 1903, 'so far as it relates to the immigration of prostitutes, in order effectively to prohibit undesirable practices alleged to have grown up'. This I take to mean that the words 'or for any other immoral purpose' have been added to the word 'prostitution', in order to prevent undesirable practices alleged to have grown up in relation to the immigration of prostitutes. Upon general principles the added words must be understood as meaning 'for any other like immoral purpose', so that the question becomes this: whether a man who brings his mistress into this country is committing an act ejusdem generis with bringing in a prostitute.

Concubinage is the act upon the part of the woman who is cohabiting with a man without ceremonial marriage, or consent and intent good at common law. A discussion of the difference

between this status and that of the prostitute would be both needless and nauseating. It suffices to say that from any point of view, historical, social, or legal, I do not think that the mistress is near enough to the prostitute to be included by general words in a statute directed against the latter unfortunate class."

The view of the circuit judge was not adopted by the Supreme Court of the United States when its opinion was announced by Mr. Justice Harlan, as follows:

"This is a criminal prosecution under an act of Congress regulating the immigration by aliens into the United States.

By the act of March 3d, 1875, chap. 141, relating to immigration, it was made a felony, punishable by imprisonment not exceeding five years and by fine not exceeding $5000, for any one knowingly and wilfully to import or to cause the importation of women into the United States for the purposes of 'prostitution'. 18 Stat. at L. 477, U. S. Comp. Stat. 1901, p. 1285.

By the act of March 3d, 1903, chap. 1012, it was provided: 'That the importation into the United States of any woman or girl for the purposes of prostitution is hereby forbidden; and whoever shall import or attempt to import any woman or girl into the United States for the purposes of prostitution, or shall hold or attempt to hold any woman or girl for such purposes in pursuance of such illegal importation, shall be deemed guilty of a felony, and, on conviction thereof, shall be imprisoned not less than one nor more than five years, and pay a fine not exceeding five thousand dollars.' 32 Stat. at L. 1213, 1214.

A more comprehensive statute regulating the immigration of aliens into the United States was passed on February 20th, 1907. By that act

the prior act of 1903 (except one section) was repealed. The 3d section of this last statute was in these words: 'That the importation into the United States of any alien woman or girl for the purpose of prostitution, or for any other immoral purpose, is hereby forbidden; and whoever shall, directly or indirectly, import, or attempt to import, into the United States, any alien woman or girl for the purpose of prostitution, or for any other immoral purpose, or whoever shall hold or attempt to hold any alien woman or girl for any such purpose in pursuance of such illegal importation, or whoever shall keep, maintain, control, support, or harbor in any house or other place, for the purpose of prostitution, or for any other immoral purpose, any alien woman or girl, within three years after she shall have entered the United States, shall, in every such case, be deemed guilty of a felony, and, on conviction thereof, be imprisoned not more than five years and pay a fine of not more than five thousand dollars; and any alien woman or girl who shall be found an inmate of a house of prostitution or practicing prostitution, at any time within three years after she shall have entered the United States, shall be deemed to be unlawfully within the United States, and shall be deported as provided by sections twenty and twenty-one of this act.' 34 Stat. at L. 898, chap. 1134, U. S. Comp. Stat. Supp. 1907, p. 389.

The defendant in error, Bitty, was charged by indictment in the circuit court of the United States for the southern district of New York with the offense of having unlawfully, wilfully, and feloniously imported into the United States from England a certain named alien woman for *'an immoral purpose', namely, 'that she should live with him as his concubine'.*

* * * * * *

We come now to the merits of the case, and they are within a very narrow compass. The earlier statutes, we have seen, were directed against the importation into this country of alien women for the purposes of prostitution. But the last statute, on which the indictment rests, is, we have seen, directed against the importation of an alien woman 'for the purpose of prostitution *or for any other immoral purpose'*; and the indictment distinctly charges that the defendant imported the alien woman in question *'that she should live with him as his concubine'*; that is, in illicit intercourse, not under the sanction of a valid or legal marriage. Was that an immoral purpose within the meaning of the statute? The circuit court held, in effect, that it was not, the bringing of an alien woman into the United States that she may live with the person importing her as his concubine not being, in its opinion, an act *ejusdem generis* with the bringing of such a woman to this country for the purposes of 'prostitution'. Was that a sound construction of the statute?

All will admit that full effect must be given to the intention of Congress as gathered from the words of the statute. There can be no doubt as to what class was aimed at by the clause forbidding the importation of alien women for purposes of 'prostitution'. It refers to women who, for hire or without hire, offer their bodies to indiscriminate intercourse with men. The lives and example of such persons are in hostility to 'the idea of the family as consisting in and springing from the union for life of one man and one woman in the holy estate of matrimony; the sure foundation of all that is stable and noble in our civilization; the best guaranty of that reverent morality which is the source of all beneficent progress in social and political improvement'. Murphy v. Ramsey, 114 U. S. 15, 45, 29 L. ed. 47, 57, 5 Sup. Ct. Rep. 747, 764.

Congress, no doubt, proceeded on the ground that contact with society on the part of alien women leading such lives would be hurtful to the cause of sound private and public morality and to the general well-being of the people. Therefore the importation of alien women for purposes of prostitution was forbidden and made a crime against the United States. *Now, the addition in the last statute of the words, 'or for any other immoral purpose', after the word 'prostitution', must have been made for some practical object.* Those added words show beyond question that Congress had in view the protection of society against another class of alien women other than those who might be brought here merely for the purposes of 'prostitution'. In forbidding the importation of alien women 'for any other immoral purpose', Congress evidently thought that there were purposes in connection with the importation of alien women which, as in the case of importations for prostitution, were to be deemed immoral. It may be admitted that, in accordance with the familiar rule of *ejusdem generis,* the immoral purpose referred to by the words 'any other immoral purpose' must be one of the same general class or kind as the particular purpose of 'prostitution' specified in the same clause of the statute. 2 Lewis' Sutherland, Stat. Constr. Sec. 423, and authorities cited. But that rule cannot avail the accused in this case; for the immoral purpose charged in the indictment is of the same general class or kind as the one that controls in the importation of an alien woman for the purpose strictly of prostitution. The prostitute, may, in the popular sense, be more degraded in character than the concubine, but the latter none the less must be held to lead an immoral life, if any regard whatever be had to the views that are almost universally held in this country as to the relations which may right-

fully, from the standpoint of morality, exist between man and woman in the matter of sexual intercourse. We must assume that, in using the words 'or for any other immoral purposes', Congress had reference to the views commonly entertained among the people of the United States as to what is moral or immoral in the relations between man and woman in the matter of such intercourse. Those views may not be overlooked in determining questions involving the morality or immorality of sexual intercourse between particular persons. Chief Justice Marshall, speaking for the court, said that 'though penal laws are to be construed strictly, they are not to be construed so strictly as to defeat the obvious intention of the legislature. The maxim is not to be so applied as to narrow the words of the statute to the exclusion of cases which those words, in their ordinary acceptation, or in that sense in which the legislature has used them, would comprehend. *The intention of the legislature is to be collected from the words they employ.* * * * The case must be a strong one indeed which would justify a court in departing from the plain meaning of words, especially in a penal act, in search of an intention which the words themselves did not suggest.' United States v. Wiltberger, 5 Wheat. 76, 95, 96, 5 L. ed. 37, 42, 43. In United States v. Winn, 3 Sumn. 209, 211, Fed. Cas. No. 16, 740, Mr. Justice Story said that the proper course is 'to search out and follow the true intent of the legislature, and to adopt that sense of the words which harmonizes best with the context, and promotes in the fullest manner the apparent policy and objects of the legislature'. To the same effect are United States v. Morris, 14 Pet. 464, 10 L. ed. 543; American Fur. Co. v. United States, 2 Pet. 358, 367, 7 L. ed. 450, 453; United States v. Lacher, 134 U. S. 624, 628, 33 L. ed. 1080, 1083, 10 Sup. Ct. Rep. 625; Sedgw. Stat. & Const. Law, 2d ed. 282; Maxwell, In-

terpretation of Statutes, 2d ed. 318; Guided by these considerations and rules we must hold that Congress intended by the words 'or for any other immoral purpose', to include the case of any one *who imported into the United States an alien woman that she might live with him as his concubine.* The statute in question, it must be remembered, was intended to keep out of this country immigrants whose permanent residence here would not be desirable or for the common good, and we cannot suppose either that Congress intended to exempt from the operation of the statute the importation of an alien woman brought here only that she might live in a state of concubinage with the man importing her, or that it did not regard such an importation as being for an immoral purpose.

The judgment must be reversed, and the case remanded with directions to set aside the order dismissing the indictment and overrule the demurrer, and for such further proceedings as will be consistent with this opinion."

A still more recent case bearing on this same subject of commercial or commercialized vice, is that of *John Arthur Johnson v. United States of America,* determined by the U. S. Circuit Court of Appeals for the Seventh Circuit, January Session, 1914.

The accused in that case was one who, in one way or another, had achieved not only national but international reputation. The opinion of the Circuit Court of Appeals is by Baker, Circuit Judge.

The following is found in the opinion:

"Plaintiff in error, defendant below, was convicted of violating the White Slave Traffic Act, which makes it a felony for any one know-

ingly to 'transport or cause to be transported, or aid or assist in obtaining transportation for, or in transporting, in interstate or foreign commerce, any woman or girl for the purpose of prostitution or debauchery or any other immoral purpose'.

One group of counts on which defendant was held charged that he procured the transportation of a girl from Pittsburgh to Chicago for the immoral purpose of having sexual intercourse with her. In another group the purpose laid was prostitution.

Respecting the first group the evidence showed that the girl, in financial straits at Pittsburgh, endeavored to reach defendant by long distance telephone; that an employee of defendant answered, and to him she told her plight; that the next day she received a telegram, signed 'Jack', asking what she needed for expenses; that in reply to her answer she received a telegram reading, 'I am sending you $75. Go to Chicago at Graham's and wait until I get there. Jack'; that she drew the $75 from the Postal Telegraph Company, purchased therefrom a ticket to Chicago, and traveled to that city on the Pennsylvania railroad; and that defendant shortly thereafter had sexual intercourse with this girl in Chicago.

No direct evidence was adduced to establish the authenticity of the telegrams. But from defendant's statement on the witness stand that he would not say that he had or had not sent them, from the fact that defendant on his arrival in Chicago called the girl by telephone at Graham's, and from the fact as testified to by the girl that defendant at their first meeting inquired, 'Did you receive the $75 I sent you?' the jury were warranted in finding that defendant was the author of the messages and the furnisher of the money for the girl's transportation.

On the evidence thus far cited, a suspicion might be entertained that the purpose of the transportation was sexual intercourse. This evidence also is consistent with the theory that defendant had no sexual intent at the time he aided the girl in her travels. And the presumption of innocence would require the adoption of this theory if here the evidence stopped. But the record further establishes that before aiding this girl defendant habitually indulged in promiscuous sexual intercourse; that this girl was a prostitute; that defendant first met her several years before in a brothel; that throughout the period of their acquaintance they maintained sexual relations; and that frequently in his journeys about the country took the girl with him or had her travel to meet him, and always for the purpose of sexual intercourse. This additional evidence furnished a basis from which the jury could justifiably draw the inference of fact that when defendant furnished the transportation he did so for the purpose of having sexual intercourse with the girl after their arrival in Chicago, just as a jury may reject a defendant's protestation of innocence in passing counterfeit when the evidence shows that prior to the act in question he had habitually or frequently passed other similar counterfeits.

But a different situation affects the prostitution count. Telephone and telegraph messages contained no suggestion of prostitution. The only fact is that several days after the girl's arrival in Chicago defendant supplied the money to enable her to open and conduct a brothel. This fact might lead to a suspicion that defendant when providing transportation had the intent to aid her subsequently in her profession. But criminal convictions cannot be allowed to rest on suspicion. And there were no supplementary facts like those that support

the sexual intercourse counts—no proof that defendant had ever been connected with or interested in brothels or that prior to the act in Chicago he had ever aided this or any other girl to engage in prostitution.

Against upholding the conviction on the sexual intercourse counts defendant's first insistence is that the intention of Congress was otherwise. By noting current history we may be aware that the act, when applied to merely unlawful sexual intercourse, has been used as an instrument for blackmail or other oppressions; but that has nothing to do with a judicial ascertainment of the meaning and constitutionality of the act when it was adopted. Reference is made to public debates as indicative of the author's intent. But the writer of a bill may explain his purpose to fellow members and they may vote for it solely because in their judgment it has a wider or narrower scope than he states. This is one of the considerations that ages ago led to the universal primary canon of interpretation, that in the absence of ambiguity apparent upon the face of a document extraneous references are not permissible and the meaning is to be gathered exclusively from the text with the words taken in their ordinary and usual meanings.

A further urge is that the words 'prostitution or debauchery or other immoral purpose' do not cover sexual intercourse that is merely unlawful. 'Other immoral purpose' are words of such generality that a criminal conviction thereunder could not be tolerated for acts whose purpose was any and every sort of immorality. They must be limited to that genus of which the preceding descriptions are species. Defendant contends that the nexus, the attribute in common, is 'commercialed vice',—that a defendant cannot be guilty unless it be shown that he is financially concerned in 'the traffic in

women'. Prostitution, the first species, involves the financial element. *But there is no condition in the statute that the furnisher of transportation shall be guiltless unless he shares or somehow profits by the hire of the woman's body.* And in Hoke's Case, 227 U. S. 308, a conviction for transporting a woman 'for the purpose of prostitution' was upheld without proof that the woman was a 'white slave', an article of barter in 'the traffic in women' or that the defendant was interested in her earnings. Debauchery, the other named species, is restricted by its assocation with the first species to sexual debauchery, a leading of a chaste girl into unchastity. *No financial element is necessarily involved in sexual debauchery; the statute introduces no such condition;* And Athanasaw's Case, 227 U. S. 326, teaches that the providing of interstate transportation for the mere purpose of attempting to lead a chaste girl into unchastity is a felony without proof that the defendant intended to be the debaucher or that he expected to profit by the girl's hire if she should become a prostitute. So it becomes apparent that 'commercialed vice' or 'the traffic in women for gain' is not the common ground; that the nexus indicative of the genus is sexual immorality; and that fornication and adultery are species of that genus. This conclusion is fortified by U. S. v. Bitty, 208 U. S. 393, where in construing the prohibition of the immigration act against the importation of alien women 'for the purpose of prostitution or any other immoral purpose' the latter phrase was held to mean unlawful sexual intercourse regardless of financial considerations. See also U. S. v. Flaspoller, 209 Fed. 1006, in reference to the White Slave Traffic Act.

Lawful power in Congress to pass an act of this scope is challenged. There was a time when it would have been interesting to examine

the contention that the word 'commerce' in the Commerce Clause of the Constitution means only 'traffic in or an exchange of commodities'. But when the ultimate tribunal long ago definitely decided that the term also includes 'navigation and intercourse', that 'transportation of persons' in and of itself is 'commerce', and that 'commerce' may not only be 'regulated' but actually prohibited in the interest of the general welfare, no room was left for profitable discussion. Passenger Cases, 7 How. 283; Gloucester Ferry Case, 114 U. S. 196; Rahrer's Case, 140 U. S. 545; Covington Bridge Case, 154 U. S. 204; Addyston Pipe Case, 175 U. S. 226; Lottery Case, 188 U. S. 321; Hoke's and Athanasaw's Cases, supra. Whole ranges of acts, like those regulating carriers, safety appliances, employers' liability for injuries to interstate trainmen, hours of dispatchers' work, twenty-eight hour confinement to live stock, movements of diseased persons or animals, pure food, etc., are upheld only on the basis that 'transportation is commerce'. Nothing remains but to say that the present act obviously is concerned with the interstate transportation of persons. How far and with what governmental purposes the undoubted power shall be exercised must be determined by the legislature, not the judicial, department of government."

The law was sustained in a decision by District Judge Foster of the Eastern District of Louisiana, in *United States v. Flasboller,* 205 Fed. 1007.

The court there said:

"The indictment sets out that the woman was persuaded to go from one state to another for the purpose of engaging in illicit intercourse, cohabitation, and concubinage with the accused. Certainly illicit cohabitation and concubinage

are immoral acts analogous to prostitution, and come well within the letter of the statute.

The White Slave Act has been held to be constitutional (see Hoke and Economides v. United States, 227 U. S. 308, 33 Sup. Ct. 281, 57 L. Ed. ....., decided by the Supreme Court February 24, 1913), and is but a further declaration of the public policy of the United States as originally expressed in the immigration acts. In my opinion the case is on all fours with that of United States v. Bitty, 208 U. S. 393, 28 Sup. Ct. 396, 52 L. Ed. 543, and the interpretation of the statute must be controlled by that decision." The demurrer will be overruled."

Another recent case upholding the statute is *Weddel v. United States,* decided by the Circuit Court of Appeals of the Eighth Circuit on March 30 of the present year, 213 Fed. 208.

Another recent case upholding the statute is *Latham v. United States,* decided in the Circuit Court of Appeals, Fifth Circuit, on January 20th of the present year, 210 Fed. 159.

Still another adjudication on the subject by the Supreme Court of the United States is

Wilson v. United States, 34 Sup. Ct. Rep. 347.

The court there, speaking by Mr. Justice Pitney, said:

"This case comes here upon two separate writs of error allowed upon the same record, to review judgments of the district court imposing fine and imprisonment upon each of the plaintiffs in error, upon their conviction on an indictment founded upon the act of Congress of June 25, 1910, commonly known as the white

NOTE: In the brief in the Diggs case and on the joint oral argument of both cases, much stress was laid on the point that error was committed in the comment by the trial judge and by counsel on the silence of defendant and his failure to deny or explain the incidents of the Reno trip while on the stand. In view of the importance attached to the matter by defendant's counsel, we have called attention in an "addendum" at the end of this brief to some late Missouri cases overruling the doctrine of the early Missouri cases cited and relied on by counsel for both plaintiffs in error, and to a long line of cases sustaining our position. The addendum immediately follows the closing page of this brief, the pages being numbered 259 to 265.

slave act (36 Stat. at L. 825, chap. 395, U. S. Comp. Stat. Supp. 1911, p. 1343).

The case was brought directly to this court because the constitutionality of the statute was drawn in question. This question has since been settled adversely to plaintiffs in error. Hoke v. United States, 227 U. S. 308, 57 L. ed. 523, 43 L. R. A. (N. S.) 906, 33 Sup. Ct. Rep. 281, Ann. Cas. 1913E, 905."

IV.

THE ACCUSED HAVING VOLUNTARILY TAKEN THE WITNESS STAND WAIVED ALL IMMUNITY—HIS SILENCE AND HIS STATEMENTS ALIKE ARE LEGITIMATE SUBJECTS FOR CRITICISM AND COMMENT.

Much of the brief filed by plaintiff in error is taken up by references to the alleged misconduct of counsel and to the error on the part of the court in that same connection, based on the fact that counsel and the court criticised the failure on the part of defendant to deny certain matters testified to by the witnesses Warrington and Norris. The text books and adjudicated cases alike show that there is no merit in this contention so repeatedly made by counsel in their brief.

The rule on the subject is thus stated in *12 Cyc.*, pp. 576-7:

> "The statute which provides that the neglect or refusal of the accused to testify shall not be commented upon by the prosecuting attorney, is usually mandatory. This being so the prosecuting attorney should therefore maintain an absolute silence on the subject in his argument,

and any reference, direct or indirect, to the absence of the accused from the witness stand is generally deemed reversible error. Where, however, defendant goes on the stand as a witness, he occupies the position of any other witness and may be cross-examined and may be cross-examined to the same extent. The prosecuting attorney then has the same right to attack his credibility in argument or to comment upon his testimony or upon his failure or refusal to answer proper and material questions within his knowledge as in the case of any other witness.

The statute prohibiting counsel from commenting on the failure of the accused to testify in his own behalf does not apply either in the case where he is a witness for himself but fails to testify to material matters."

The rule is thus referred to in

Wharton's Criminal Evidence, Sec. 681:

"But if the defendant, having full opportunity to do so, failed on the stand to controvert that which was testified against him, this may be regarded, when the matter is one within his personal knowledge, as an admission of the truth of such testimony."

A case frequently cited on this subject is:

State v. Ober, 52 N. H. 459.

It is also reported in 13 American Reports, 88. At page 91 we find the following:

"The respondent was not bound to volunteer any statement concerning the matter of the charge against him, nor could he be compelled to disclose any fact, or answer any question which would expose him to another criminal prosecution, or tend to convict him in this.

Such immunity from confession, examination, argument or prejudicial inference, was his undoubted privilege; but he chose to waive it, and insisted on his right to testify; and having testified concerning a part of the transaction, in which it was alleged that he was criminally concerned, without claiming his constitutional privilege, it was too late for him to halt at that point which suited his own convenience. It is clear, upon reason and authority, that he might have been compelled to answer the question propounded by the State's counsel. It was material to the issue, if not directly involved in his own proffered testimony. At this point, for obvious reasons, he saw fit to close his lips, and the court allowed him to remain silent. Of this mistaken clemency he cannot now be heard to complain.

The whole argument of his counsel now proceeds upon the erroneous assumption that the ruling of the court was right. That assumption being groundless, his argument fails.

The views of so eminent a man as Judge Cooley seem to be adverse to those now expressed. He inclines to the opinion that a party accused of crime should be and is entitled, under statute of Michigan allowing the accused to give evidence in his own behalf, to disclose no more than he chooses—('if he does testify, he is at liberty to stop at any point he chooses, and it must be left to the jury to give a statement, which he declines to make a full one, such weight as, under the circumstances, they think it entitled to; otherwise the statute must have set aside and overruled the constitutional maxim which protects an accused party against being compelled to testify against himself; and the statutory privilege becomes a snare and a danger.') Cooley's Const. Lim. 317; also p. 182.

The learned jurist does not furnish us with cases in support of his views, which, after such consideration of them as the great ability and learning of Judge Cooley compel, we cannot regard as being supported by authority or sound reason. But the statute of Michigan is peculiar. By its provisions the accused is allowed to make a statement to the court or jury, and may be cross-examined on any such statement. It has been held, says Judge Cooley, that this statement should not be under oath.

In speaking of this statute and of the right given to cross-examine the party who has made his statement, Judge Campbell says: 'And while his constitutional right of declining to answer questions cannot be removed, yet a refusal to answer any fair question, not going outside of what he has offered to explain, would have its proper weight with the jury.' People v. Thomas, 9 Mich. 321.

Upon the whole, we are unable to reach any other conclusion than that the respondent's testimony, so far as it went—and not less than the fact that it went no further—his refusal to submit to a full cross-examination, within proper limits, after waiving his constitutional privilege, and all his conduct and demeanor, were proper matters for comment by counsel and court, as well as for the consideration of the jury."

Following the case is a note by the reporter which is in the language following:

"Note.—To the third edition of his work on Constitutional Limitations, Judge Cooley appends (page 317) the following note relative to the foregoing case: 'By a recent case this paragraph appears to have led to some misapprehension of our views, and consequently we must regard it as unfortunately worded. Neverthe-

less, after full consideration, it has been concluded to leave it as it stands. What we intend to affirm by it is, that the privilege to testify in his own behalf is one the accused may waive without justly subjecting himself to unfavorable comments; and that if he avails himself of it, and stops short of a full disclosure, no compulsory process can be made use of to compel him to testify further. It was not designed to be understood that in the latter case, his failure to answer any proper question would not be the subject of comment and criticism by counsel; but on the contrary, it was supposed that this was implied in the remark that "it must be left to the jury to give a statement which he declines to make a full one, such weight as, under the circumstances, they think it is entitled to." All circumstances which it is proper for the jury to consider, it is proper for counsel to comment upon.'

The author then proceeds to state the above case of State v. Ober, and continues, 'we not only approve of this ruling but we should be at a loss for reasons which could furnish plausible support for any other. It is in entire accord with the practice which has prevailed, without question, in Michigan, and which has always assumed that *the right of comment, where the party makes himself his own witness and then refuses to answer proper questions, was as clear as the right to exemption from unfavorable comment when he abstained from asserting his statutory privilege.*'—Rep."

A case very frequently cited on this point is *Stover v. The People of the State of New York,* 56 N. Y. 315. On page 320 the court uses this language:

"The court, in substance, *charged the jury that they were at liberty to consider, as a cir-*

cumstance, the failure of the accused, while a witness, to give any account as to where the money found upon him had been kept in the interval from the time he claimed to have received it until it was so found. To this portion of the charge his counsel excepted. This raises the question as to the construction of section 1 of chapter 678 of Laws of 1869 (vol. 2, 1597). That section, among other things, provides that upon the trial of all indictments charging a criminal offence, the person charged, shall, at his own request, but not otherwise, be deemed a competent witness, but that the neglect or refusal of any such person to testify shall not create any presumption against him. The general rule is that, when it appears that a party charged with the commission of crime has the power, if innocent, to explain a fact or circumstance tending to show his guilt, fails to give such explanation, such failure may be considered as a circumstance against him. In the present case, the question is whether his failure to give any explanation of such a fact or circumstance, which he could do if innocent, when testifying in his own favor, he having requested to become a witness, comes within this general rule. The argument in behalf of the accused is, that he cannot be made a witness at all except by his own request, and that his failure to be a witness shall not create any presumption against him, and that if he requests to be a witness and becomes such he need give testimony only as to such parts of his case as he may choose; and as to other parts as to which he does not request or desire to give testimony, no presumption can be created against him for his failure to testify. In this construction I cannot concur. True, it is at the option of the accused whether or not to become a witness. *When he has exercised this and become a witness he is made competent for*

all purposes in the case; if by his own testimony he can explain and rebut a fact tending to show his guilt, if innocent, and he fails to do so, the same presumption arises from his failure that would arise from a failure to give the explanation by another witness, if in his power so to give it. The reason for the presumption is alike in both cases. It arises from the known desire of parties to repel or explain accusatory evidence against them, if in their power; and the basis of the presumption is that the case shows that it is in their power if innocent. Hence a failure tends to show an absence of innocence."

The rule was recognized in

People v. Mead, 145 Cal. 500.

The 5th subdivision of the syllabus, which is borne out by the case, is in this language:

"Where there had been evidence on the part of the prosecution satisfactorily showing that a legal marriage had been performed, and that the defendant had testified equivocally on that subject and denied the marriage, if at all, only by implication, it was not misconduct for the district attorney to comment upon his failure expressly to deny that the woman who was placed in the house of prostitution was his wife."

Another California case is

People v. Wong Bin, 139 Cal. 65-6:

"There is nothing in the point made as to the argument of the district attorney. The defendant had voluntarily gone upon the stand as a witness, and as such witness went fully into the details of the difficulty, claiming that the killing was in self-defense. Under these circumstances the district attorney was au-

thorized in commenting upon his failure to deny certain alleged statements testified to by other witnesses to have been made by him, inconsistent with his testimony given on the trial. (Nevada v. Harrington, 12 Nev. 125; Stover v. People, 56 N. Y. 315.) The question thus presented is very different from the case where the defendant is not a witness at all, or a witness only as to some formal matter."

State v. Harrington, 12 Nev. 129-131.

In that case the court said:

"Under the constitution of this state, no person accused of a crime can be compelled to testify against himself; but under the statute, at his own request, but not otherwise, he shall be deemed a competent witness, the credit to be given to his testimony being left solely to the jury, under the instructions of the court. The statute further provides, that in all cases wherein the defendant in a criminal action declines to testify, the court shall specifically instruct the jury that no inference of guilt is to be drawn against him for that cause. (Comp. Laws, secs. 2305-6.) Courts have nothing to do with the wisdom or policy of a statute. Their only duty, in a proper case, is to enforce it.

Under the statute mentioned, in a case wherein the defendant in a criminal action declines to testify, the court shall specially instruct the jury as prescribed in the act. Certainly, there is nothing in the statute requiring the court to so instruct the jury in a case wherein he does not decline to testify; but, on the contrary, wherein he voluntarily makes himself a witness in his own behalf, as in this case. A defendant on trial in a criminal action, in this state, may plead not guilty, and thereafter sit in silence, or he may, at his option, testify for himself. *If he chooses the latter course, he is to be held*

and treated, so far as his testimony goes, like any other witness.

* * * 'All circumstances which it is proper for the jury to consider it is proper for counsel to comment upon.' (See, also, State v. Ober, 52 N. H. 462; State v. Cohn, 9 Nev. 179; State v. Huff, 11 Nev. 27; Connors v. People, 50 N. Y. 240.) *As affecting the right of the jury to consider, or of counsel to comment upon, the circumstances, we can perceive no difference between the refusal of defendant to answer a proper question upon cross-examination and neglecting to testify upon some material matter within his knowledge, proven against him by the prosecution.*

The authorities are somewhat conflicting upon the question whether or not, if the defendant in a criminal case voluntarily testifies, he can be compelled upon cross-examination to answer a proper question concerning any fact upon which he testified in chief. It being unnecessary to decide the question in this case, we express no opinion upon it.

Our conclusions are that, if the defendant in a criminal action voluntarily testifies for himself, the same rights exist in favor of the State's attorney to comment upon his testimony, or his refusal to answer any proper question, or to draw all proper inferences from his failure to testify upon any material matter within his knowledge, as with other witnesses. Nor are the two cases cited by counsel for appellant (People v. Tyler, 36 Cal. 522; People v. McGungill, 41 Cal. 429), opposed to our conclusions."

The rule is recognized and enforced by the Supreme Court of the United States in *Fitzpatrick v. United States,* 178 U. S. 304-316; 44 Law Ed. 1083. The court said:

"Error is also assigned in not restricting the cross-examination of the plaintiff in error. Defendant himself was the only witness put upon the stand by the defense, who was connected with the transaction; and *he was asked but a single question, and that related to his whereabouts on the night of the murder.* To this he answered: 'I was up between Clancy's and Kennedy's. I had been in Clancy's up to about half past twelve or one o'clock—about one o'clock, I guess. I went up to Kennedy's and had a few drinks with Captain Wallace and Billy Kennedy, and I told them I was getting kind of full and I was going home, and along about quarter past one, Wallace brought me down about as far as Clancy's, and then he took me down to the cabin and left me in the cabin, and we wound the alarm clock and set it to go off at six o'clock, and I took off my shoes and lay down on the bunk and woke up at six o'clock in the morning, and went up the street.'

On cross-examination *the government was permitted, over the objection of defendant's counsel, to ask questions relating to the witness's attire on the night of the shooting, to his acquaintance with Corbett, whether Corbett had shoes of a certain kind, whether witness saw Corbett on the evening of March 12, the night preceding the shooting, whether Corbett roomed with Fitzpatrick in the latter's cabin, and whether witness saw anyone else in the cabin besides Brooks and Corbett.* The court permitted this upon the theory that it was competent for the prosecution to show every movement of the prisoner during the night, the character of his dress, the places he had visited, and the company he had kept.

Where an accused party waives his constitutional privilege of silence, takes the stand in his own behalf and makes his own statement, it

is clear that the prosecution has a right to cross-examine upon such statement with the same latitude as would be exercised in the case of an ordinary witness, as to the circumstances connecting him with the alleged crime. While no inference of guilt can be drawn from his refusal to avail himself of the privilege of testifying, *he has no right to set forth to the jury all the facts which tend in his favor without laying himself open to a cross-examination upon those facts.* The witness having sworn to an alibi, *it was perfectly competent for the government to cross-examine him as to every fact which had a bearing upon his whereabouts upon the night of the murder, and as to what he did and the persons with whom he associated that night. Indeed, we know of no reason why an accused person who takes the stand as a witness should not be subject to cross-examination as other witnesses are.* Had another witness been placed upon the stand by the defense, and sworn that he was with the prisoner at Clancy's and Kennedy's that night, it would clearly have been competent to ask what the prisoner wore, and whether the witness saw Corbett the same night or the night before, and whether they were fellow occupants of the same room. While the court would propably have no power of compelling an answer to any question, *a refusal to answer a proper question put upon cross-examination has been held to be a proper subject of comment to the jury.* (State v. Ober, 52 N. H. 459); and it is also held in a large number of cases that when an accused person takes the stand in his own behalf, he is subject to impeachment like other witnesses."

The rule is also referred to in *Powers v. United States,* 223 U. S. 303-316; 56 Law Ed. 448.

At page 453 Law Ed. Mr. Justice Day says:

> "There is some difference of opinion expressed in the authorities, but the rule recognized in this court is that a defendant who voluntarily takes the stand in his own behalf, thereby waiving his privilege, may be subjected to a cross-examination concerning his statement. 'Assuming the position of a witness, he is entitled to all its rights and protection, and is subject to all its criticisms and burdens;' and may be fully cross-examined as to the testimony voluntarily given. (Citing cases.) 'Thus, if the witness himself elects to waive his privilege, as he may doubtless do, since the privilege is for his protection, and not for that of other parties, *and discloses his criminal connections, he is not permtted to stop, but must go on and make a full disclosure.*" (Citing Green on Evidence, and other authorities.)

Sawyer v. United States, 202 U. S. 150-168; 50 Law Ed. 979.

In that case Mr. Justice Peckham, speaking for the court, said:

> "Another question argued arises upon the cross-examination by the district attorney, of the plaintiff in error Adams, who voluntarily became a witness on the trial on his own behalf and in behalf of his fellow plaintiff in error. The cross-examination referred to the conduct of the witness on a previous voyage and on a different vessel, in regard to which nothing had been said on the examination of the witness in chief.
>
> It has been held in this court that a prisoner who takes the stand in his own behalf waives his constitutional privilege of silence, and that the prosecution has the right to cross-examine

> him upon his evidence in chief with the same latitude as would be exercsed in the case of an ordinary witness, as to the circumstances connecting him with the crime. Fitzpatrick v. United States, 178 U. S. 304, 44 L. Ed. 1078."

Cotton v. State, decided by the Supreme Court of Alabama, 6 South. 372.

It was held in that case, as shown by the syllabus, that:

> "Where defendant elects to become a witness in his own behalf, *his failure to explain criminating circumstances is a matter to be considered by the jury, and he is not protected from the criticism of the state's counsel* by Crim. Code Ala. Sec. 4473, *providing that his failure to become a witness shall not be a subject of comment by counsel."*

A similar ruling was made in *Graves v. State,* also decided by the Supreme Court of Alabama, 7 South. 317.

Another Alabama case in which the rule is cited is *Clark v. State,* 78 Ala. 474.

In the last case cited the rule is thus stated, as shown by the syllabus:

> "When a defendant becomes a witness in his own behalf, he waives his constitutional right for protection against compulsory self crimination. Like any other witness he must submit to cross-examination, and *his failure to explain any fact or circumstance within his knowledge, tending to exculpate him, is a proper subject of comment by the prosecution."*

State v. Glade, decided by the Supreme Court of Kansas, 33 Pac. 8.

The rule in this case was thus stated:

> "The testimony of a defendant so taking the witness stand and giving testimony to be considered by the jury, may be commented upon by counsel in the same manner as the other testimony in the case, and it is not error in such a case to permit counsel for the state to comment on his failure to testify with reference to material matters within his knowledge."

In concluding this section of our argument referring to the misconduct of counsel and the alleged grievous errors of the trial judge in allowing comment on the failure of the witness to testify to certain matters given in evidence against him, it may be well to call attention particularly to the portion of Judge Van Fleet's charge which is involved. It is found at pages 439-440 of the record. It is in this language:

> "As has been stated to you by defendant's counsel in their argument, one of the most material facts left in this case for your determination in reaching a verdict is as to the purpose or intent with which these girls were transported to Reno on the occasion in question, should you find that they were so transported. Upon this question the defendant has introduced the evidence of several witnesses, and has himself testified, to facts tending to show certain threats emanating from the father of Maury I. Diggs, and the wife of the latter, and others, and communicated to himself and his companion Diggs, from which it is claimed that their sole actuating motive in leaving Sacramento was to escape arrest and exposure and possible personal violence at the hands of the father of one of the girls. This evidence is all before you for your consideration in connec-

tion with the other evidence in the case bearing upon that subject. The defendant, however, in his testimony, did not in any express or direct way touch upon the Reno trip, or specifically state what his purpose or intent was in taking these girls, or either of them, with him, if you find they were so taken; nor has he testified as to what the facts or incidents of that trip were,—confining himself to a statement of certain things occurring before that trip was taken, and their effect upon his state of mind. Now it was the defendant's privilege to thus limit his testimony, and, being a defendant, he could not be required to say more if it was not his desire to do so; nor could he be asked in cross-examination as to matters not covered by his direct testimony. But in passing upon the evidence in the case for the purpose of finding the facts, you have a right, as has been stated to you by counsel for the Government, to take this omission of the defendant into consideration. A defendant is not required under the law to take the witness-stand. He cannot be compelled to testify at all, and if he fails to do so no inference unfavorable to him may be drawn from that fact, nor is the prosecution permitted in that case to comment unfavorably upon his silence; but where a defendant elects to go upon the witness-stand and testify, he then subjects himself to the same rule that applies to any other witness, and if he has failed to deny or explain acts of an incriminating nature that the evidence of the prosecution tends to establish against him, such failure may not only be commented upon, but may be considered by the jury in connection with all the other circumstances in reaching their conclusion as to his guilt or innocence."

This language of the charge as we read it is entirely in line with the various State and Federal

adjudications made on the subject. The main reliance of the counsel for the accused is on the case of

Balliet v. United States, 129 Fed. 689.

The instruction in that case bears no resemblance whatever to the instruction of Judge Van Fleet in the case at bar. The instruction is quoted at page 695 of the report in this language:

> "It has been suggested that I have overlooked one thing. I may say you may consider in determining the question, the fact that the defendant having gone upon the witness stand, *if he has not fully explained, or has not explained matters which are material to the issues in this case,* and which are naturally within his knowledge, you may consider that as a circumstance tending to show that the facts *if explained would bear out the contention of the Government, and his failure to give them or to give a truthful explanation is against him.*"

This is vastly different from the language of the trial judge in the case at bar, who charged the jury that they might "take this omission of the defendant into consideration," and who said further that his failure might not only be commented upon, but might be considered by the jury in connection with all the other circumstances in reaching their conclusion as to his guilt or innocence.

In commenting on the form of the instruction, Judge Thayer said in the Balliet case:

> (695) "This rule of law would put the defendant in a criminal case in a peculiar attitude, but if he takes the stand as a witness *he*

must perforce explain every fact and circumstance which has been put in evidence against him as tending to establish guilt, *which a jury may deem material,* and such as he could explain, at the risk of having them conclude, because of his silence with reference to such facts and circumstances, that they are true and that he is guilty. * * *

If a defendant in a criminal trial desires to take the stand and contradict some particular fact and circumstance which has been testified to, he cannot safely do so for fear of raising a *presumption of guilt* by his failure to explain other facts and circumstances in evidence which *the jury may happen to regard as material and may think the accused could explain.* * * *

When the defendant in a criminal case in compliance with this statute (March 16, 1878) waives his constitutional privilege by taking the witness stand, he occupies the attitude of any other witness and may be cross-examined like an ordinary witness and to the same extent. Fitzpatrick v. United States, 178 U. S. 304. * * *

It is also doubtless true that, when a defendant in a criminal case takes advantage of the statute and testifies in his own favor, the Government may comment on his testimony and draw inferences therefrom as freely as if it were an ordinary witness and not the accused. * * * The instruction was of a nature which permitted the jury to draw unfavorable inferences against the accused because in the course of his examination he *had not alluded to every fact and circumstance already in evidence and given an explanation thereof consistent with his innocence.* We are satisfied that the instruction *cast an undue burden on the defendant* and that it was also misleading."

The Balliet case, in our judgment, does not sustain the contention of counsel. But if it should be so considered it cannot stand as against the long line of Federal and State decisions cited by us in the preceding pages. The instruction given by the distinguished trial judge was in line with the vast line of adjudications made by the Supreme Court of the United States and by the various states in the American Union.

Outside of the Balliet case, the main reliance of counsel for the accused, is on certain decisions of the Supreme Court of the State of Missouri, where the rule is entirely at variance with the general trend of American authority.

V.

THERE WAS NO ERROR IN THE REFUSAL OF THE TRIAL COURT TO GIVE THE INSTRUCTIONS REQUESTED ON THE SUBJECT OF LOLA NORRIS AND MARSHA WARRINGTON BEING ACCOMPLICES AND FOR THAT REASON VIEWING THEIR TESTIMONY WITH DISTRUST.

On pages 147 to 169 of their brief, counsel for the accused discuss the proposition that the trial court erred in refusing various instructions requested on the subject of accomplices. They claim that both Lola Norris and Marsha Warrington were accomplices of the accused.

PROPOSED INSTRUCTIONS WERE INAPPLICABLE TO ANY ISSUE IN THE CASE.

It, of course, must be conceded by counsel representing the plaintiff in error that unless these proposed instructions were responsive to some phase of the controversy then being tried, the court was justified in refusing to give any of them to the jury.

Chicago v. Robbins, 17 Law Ed. 298; 2 Black 418;

Keyser v. Hitz, 133 U. S. 138;

N. Y. Syndicate v. Fraser, 130 U. S. 611.

It would follow, therefore, that if the record is destitute of any evidence upon which the jury, under appropriate instructions, would be justified in reaching the conclusion that either Lola Norris or Marsha Warrington was an accomplice, the action of the lower court in refusing to give to the jury the requested instructions was not only eminently proper but the only course which it had the legal right to pursue.

The position of the Government upon this question is that under no aspect of the case can it be successfully contended that under the evidence or the law, either Lola Norris or Marsha Warrington was, or can be held to be, an accomplice of F. Drew Caminetti.

Between the two covers of the record in this case there is neither a shred nor scintilla of evidence tending to establish that either of these two girls suggested departing from or wanted to leave the

State of California. The idea that they should desert the homes of their parents and accompany the two young men on their journey eastward or to some other place, found its origin in the fertile minds of Diggs and Caminetti.

Against the persuasions, entreaties and persistent demands of Diggs and Caminetti to leave their homes in Sacramento and go with them, they battled and fought and temporized until, coerced and frightened, they arrived at the conclusion that it was the only path to subsequent respectability and the only way of avoiding scandal that would endanger not only their names, but the reputations of their families.

The testimony shows that on the night before their departure,—being the night of the day upon which in the Peerless restaurant their long delayed consent to leave Sacramento was obtained,—and at a time when they were no longer within the influence of these contaminating forces which had been at work upon them for so many weeks, they finally made up their minds not to leave. And it was not until the next afternoon, when at the request of Diggs and Caminetti they again met Diggs in the public park, that against their own better judgment and desire they were persuaded that the only course to pursue was to flee.

Marsha Warrington was evidently the more susceptible of the two. Her then physical condition, brought about by Diggs, placed her in a position where she could no longer withstand or resist his

importunities and insistence. Is it then to be wondered that, frightened, intimidated and coerced as she was, she turned to Lola Norris and said:

> "Lola, I am going and you have got to go, too" (Testimony of Caminetti, p. 407).

Of course it will be remembered that the exclamation above narrated is testified to only by the defendant, Caminetti. That it ever occurred is positively denied by both girls. Miss Warrington on redirect examination testified:

> "I never advised Miss Norris to take this Reno trip. I told her she could do exactly as she pleased" (p. 278).

Upon this subject Miss Norris testified:

> "Miss Warrington and I talked about it when we were alone several times and we both had our opinions upon the matter, but Miss Warrington never told me that I had to go or asked me to go or anything of that kind" (p. 300).

Can it be said that because Marsha Warrington under the circumstances already depicted, said to Lola Norris, "I am going and you have got to go, too", that she thereby "knowingly, voluntarily and with common intent with F. Drew Caminetti and Maury I. Diggs, or either of them, united in the commission of the crime perpetrated by them"?

People v. Bolanger, 71 Cal. 20;
People v. Coffey, 161 Cal. 439-40;
Rice's Criminal Evidence, sec. 319;
Bishop's Criminal Procedure, sec. 1159.

This was the language of one victim to another, both of whom were about to be persuaded or coerced. This language of the accused was not effective to make of either or both of the girls accomplices in the contemplation of the White Slave Traffic Act. Especially must this be so in view of the recorded verdict that Caminetti was guilty only under the first count, which had nothing to do with inducing or persuading.

Upon a circumstance as shadowy and fragile as this would the learned judge of the court below have been justified in the exercise of a judicial or any discretion in advising the jury that if they believed that Marsha Warrington did make use of the language attributed to her, she would in law be converted into an accomplice?

That the answer to this inquiry must be in the negative is apparent, and such answer fully warranted the court and sustained its action in refusing to give to the jury any instructions upon the question of accomplice.

The definition of an accomplice negatives the idea that his activity in the commission of the offense charged was caused by force, fraud or undue influence. Where these elements exist, the conduct is no longer criminal.

As illustrative of this proposition, the case of

People v. Stratton, 141 Cal. 604-609,

is directly in point. That was a prosecution for incest. The defendant was accused of having had

sexual relations with his daughter. It was contended by him that as she consented to the act and participated therein, she was an accomplice, and therefore the conviction could not be upheld because it depended upon her uncorroborated evidence. In passing upon this question, the Supreme Court of this State, speaking through Mr. Justice Henshaw, said:

> "If the prosecutrix, being of the legal age of consent, consents to the incestuous intercourse, unquestionably she is particeps criminis and her testimony, like that of any other accomplice, uncorroborated, is insufficient to uphold a conviction, but if, upon the other hand, she is *the victim of force or fraud or undue influence,* or is too young to be able to give legal assent, so that she does not *wilfully and willingly join in the incestuous act, she cannot be regarded as an accomplice.*"

In this case, the question as to whether the daughter was or was not an accomplice was left to the jury, because the evidence disclosed that she consented to the act, her contention being that it was through force. On the other hand, the evidence on behalf of the defendant tended to establish that no force of any kind had been used.

In *People v. Miller,* 66 Cal. 468, the same proposition was involved.

There it is said:

> "In this case it is contended that the complaining witness, a boy thirteen years old, was an accomplice whose testimony requires corroboration; and as he was not corroborated the

conviction of the defendant was erroneous, but the uncontradicted testimony of the boy shows that he acted under the threats and coercion of the defendant. He was therefore not an accomplice; and as the evidence in the case was sufficient to sustain the verdict, the judgment and order must be affirmed."

A case very much in point is

Greenwood v. State, 105 Pac. 371-3.

There the plaintiff in error was convicted of feloniously advising and procuring Ethel Carpenter, a pregnant woman, to use certain instruments for the purpose of producing a miscarriage.

On appeal it was claimed that the sister of the deceased who was present at the time the abortion was subsequently performed by one other than defendant, was an accomplice. In holding otherwise, the court said:

"Her testimony is to the effect that the defendant arranged with Dr. Brewer to come to her residence and perform the operation and that when she learned of that she telephoned Dr. Brewer that he could not perform the operation at her residence and that she advised her sister against the operation, warning her of the danger attached, and urged the defendant to marry her sister, and that on her sister's urgent request she accompanied her to the doctor's office but never at any time consented to it. *In our opinion she is not to be adjudged an accomplice solely because, through sisterly affection, she went to the doctor's office, when the truth is she did not give her consent to it, but*

THE TRUE TEST OF AN ACCOMPLICE.

Neither Lola Norris nor Marsha Warrington was by any possible theory or construction of the White Slave Traffic Act an accomplice of Caminetti in the offense charged. As the victim of wrongful interstate carriage, neither could be jointly indicted with Caminetti.

In *1 Am. & Eng. Encyc. of Law and Practice,* page 550, we find the following definitions and tests of accomplices:

> "The term 'accomplice' signifies in law a *guilty associate in crime,* and is strictly defined as one who is associated with others in *commission of a crime, all being guilty.* The general test by which to determine whether one is an accomplice is the inquiry: *Could such person be indicted and punished for the crime for which the accused is being tried? If he could be indicted and punished he is an accomplice, otherwise he is not.*"

In *1 Am. & Eng. Encyc. of Law,* page 390, we find the following:

> "WHO IS AN ACCOMPLICE.—General Test.—The test in general to determine whether a witness is or is not an accomplice is the inquiry: *Could the witness himself have been indicted for the offense,* either as principal or as accessory? If he could not be so indicted he is not an accomplice."

Holmgren v. United States, 156 Fed. 439, decided by the Circuit Court of Appeals, Ninth Circuit, October 14, 1907.

In that case Judge Gilbert thus refers to the rule:

(444) "It is assigned as error that the court failed to warn the jury of the danger in convicting a defendant on the testimony of an accomplice. This assignment is based upon the theory that Frank Werta, the applicant for citizenship, was an accomplice with the plaintiff in error, who made the false oath. An accomplice is 'one who knowingly, voluntarily, and with common intent with the principal offender, unites in the commission of a crime'. People v. Bolanger, 71 Cal. 19, 11 Pac. 799; State v. Roberts, 15 Or. 197, 13 Pac. 896. To render one an accomplice, 'he must in some manner aid or assist or participate in the criminal act, and by that connection he becomes equally involved in guilt with the other party by reason of the criminal transaction'. People v. Smith, 28 Hun. (N. Y.) 626. Mere knowledge on the part of a witness that the defendant purposes to commit a crime, or does commit a crime, does not render the witness an accomplice. There is nothing in the evidence in the bill of exceptions to show that Frank Werta was an accomplice within these generally accepted definitions. There is no evidence that he solicited the plaintiff in error to make the oath concerning his residence in the United States, or suggested the facts which were sworn to or asissted him in or incited him to the commission of the offense. On the other hand, the evidence conveys the impression that the affidavits as to the time of Werta's residence in the United States were furnished not at his own, but at the instigation of others. Under the circumstances, we think it would have been error to caution the jury on the theory that Werta's testimony was that of an accomplice."

This rule is also recognized by the very California case which constitutes the mainstay of counsel for the accused upon this proposition:

People v. Coffey, 161 Cal. 433.

The court will bear in mind in considering the Coffey case that it is a decision under the California statutes which forbid the conviction of an accused person on the uncorroborated testimony of an accomplice. Of course counsel for the accused in the case at bar recognizes that no such statute or rule prevails in federal courts.

In the course of his opinion, Mr. Justice Henshaw says:

> (446) "Wherever the commission of a crime involves the co-operation of two or more people, the guilt of each will be determined by the *nature of that co-operation.* Whenever the co-operation of the parties is a corrupt co-operation, then always those agents are accomplices, even as at common law they were principals. *To the crime of seduction two parties are necessary, but the co-operation of the seduced is not criminal. She is a victim and she is not therefore an accomplice of the seducer."*

So, in the case at bar, we say that both Lola Norris and Marsha Warrington were victims. They were not seducers. They were not guilty of offenses under the White Slave Traffic Act, because as victims they had been carried beyond the borders of their native state.

At page 448 of the same opinion, Justice Henshaw uses this language:

> "This, then, is the true test and rule: If in any crime the participation of an individual has been criminally corrupt he is an accomplice. If it has not been criminally corrupt he is not an accomplice. *In those cases where the concurrent act or co-operation of two people is necessary, as in seduction, sometimes in abortion, and in the minor offenses of selling liquor, lottery tickets or harmful drugs, the relationship of accomplice does not exist because the co-operation of the other party is not denounced by the law as criminally corrupt, and, as a matter of fact, need not be criminally corrupt.*"

Could either Lola Norris or Marsha Warrington as the victim, willing or otherwise, of her interstate transportation at the hands of Caminetti, have been indicted jointly with him or otherwise, under the statute in question? Section 2 of that statute covers the only count of the indictment on which Caminetti was found guilty. It provides that any person who shall knowingly *transport or cause to be transported, or aid or assist in obtaining transportation for, or in* transporting in interstate or foreign commerce, * * * *of any woman or girl,* or who shall knowingly procure or obtain or cause to be procured or obtained, * * * any ticket or tickets, or any form of transportation, or evidence * * * *to be used by any woman or girl* in interstate or foreign commerce, etc., shall be deemed guilty of a felony.

There is nothing in this language to show that the person transported, the girl or woman whose transportation is directly procured or aided in, is

in any way amenable to the penalties denounced by the statute. The offense created is one on the part, *not of the woman or girl,* but *on the part of him or her who transports or aids in the transportation of such woman or girl.* Could any sane person contend that if Marsha Warrington or Lola Norris had with her unaided resources gone purposely to Nevada, unsolicited by Caminetti, to engage in unlawful cohabitation with him, she would have been indictable under this statute? We think not. She would not have been guilty of the criminal conduct denounced by the law. The offense denounced is the obtaining by another than the woman or the girl to be transported, of the transportation. Neither Marsha Warrington nor Lola Norris was an accomplice of Caminetti's in any offense committed by him under the White Slave Traffic Act.

ASSUMING THE GIRLS TO BE ACCOMPLICES, THE REFUSAL TO GIVE THE REQUESTED INSTRUCTIONS CONSTITUTED NO ERROR BECAUSE OF THE ACQUITTAL OF CAMINETTI ON THE LAST THREE COUNTS.

In the first count contained in the indictment the defendant was charged with having unlawfully transported and caused to be transported and in having aided and assisted in obtaining transportation for and in transporting in interstate commerce, Lola Norris, for the purpose of having her become his concubine and mistress. Upon this count alone defendant was convicted.

In the second count of the indictment he was charged with the same offense, Marsha Warrington being substituted for Lola Norris, the intention alleged being that she should become the concubine and mistress of Maury I. Diggs.

In the third count he was charged with unlawfully *persuading, inducing and enticing and assisting in persuading, inducing and enticing,* Lola Norris, to go from Sacramento to Reno, for the purpose of becoming his concubine and mistress.

In the fourth count he was charged with the same offense as to Marsha Warrington, she to become the concubine and mistress of Diggs.

Upon these last three counts the defendant was acquitted.

In view of this situation, any error that may have been committed by the court in the admission or rejection of evidence or in failing to give proposed instructions to the jury relating to any of the offenses charged in the last three counts of the indictment, was without prejudice to plaintiff in error and cannot be made the foundation for a reversal of the judgment of the lower court which is based exclusively upon the finding of the jury that the defendant was guilty of transporting and assisting in the transportation of Lola Norris from Sacramento to Reno.

The offenses denounced by the statute in its several sections are distinct.

The second section denounces the actual transportation or aid in such transportation, and the later sections denounce the persuading, inducing, enticing or coercing of the woman or girl, the victim of the transportation.

This distinction was clearly pointed out by Judge Van Fleet in his charge, where he said:

> "You will observe that the statute is very comprehensive in its language. It covers several different acts, each one of which is made a criminal offense under its provisions; those here involved being, first, the transporting or aiding in the transportation in interstate commerce of a woman or girl for such immoral purpose or with the intent to induce, entice or compel her to give herself up to such immoral purpose; and, second, the persuading, inducing or enticing any such woman or girl to be so transported in interstate commerce for such immoral purpose. These different acts constitute separate offenses under the statute. Under the first it is an offense to transport or aid in the transportation of such woman or girl for the purpose denounced, whether she goes of her own volition or is induced to go by the means stated in the statute, and whether she is to commit the immoral acts specified with the person so transporting her or with some other person or persons; and under the second phase of the statute above outlined it is an offense to persuade, induce or entice such female to be so carried or transported for such immoral purpose whether the act of immorality is to be committed with the person so persuading, inducing or enticing her or with another or others." (p. .....)

The language of Caminetti, quoted by counsel, can have no possible reference to the offenses charged against him under section 2. Its widest possible construction would be that Marsha Warrington aided him in persuading, enticing or inducing Lola Norris. Of course, both girls, as shown by the very following page of the brief of counsel, deny the language attributed to Marsha Warrington by the accused. While, as we have already argued, under the circumstances of the record it would have been grievous error for the trial judge to have given any of the instructions quoted by counsel at the pages of their brief above referred to, yet, even if the instructions were correct, the refusal to give them did Caminetti no possible harm. As already suggested he was found not guilty of *persuading, inducing or enticing* either Lola Norris or Marsha Warrington to engage in the unlawful transportation. There having been no such crime committed by him, he had no accomplice in that regard in either of the girls.

EVEN THOUGH MARSHA WARRINGTON WERE AN ACCOMPLICE, THE PROPOSED HYPOTHETICAL INSTRUCTIONS WERE ERRONEOUS.

Notwithstanding the argument advanced by plaintiff in error in this branch of his brief, in the last analysis it must be admitted that there is no evidence in the case upon which it can be asserted that Lola Norris was an accomplice. As has already been

shown, she could not have been an accomplice in her own transportation, and nowhere has it been claimed that she persuaded, induced or enticed Marsha Warrington to participate in the journey which ended in disaster to all.

If therefore the proposed hypothetical instructions impute to Lola Norris the capacity of an accomplice, or because of the language in which they are couched, would lead the jury to assume or to conclude that under the evidence she might be held to be an accomplice, such proposed instructions were properly rejected and the action of the lower court in refusing to give them to the jury cannot be held to be error.

At page 149 of the brief filed by plaintiff in error an instruction numbered 34 is shown. It is in part:

> "I instruct you as to the witness Lola Norris, if you believe her testimony, that she is an accomplice of the defendant, and in this connection I further instruct you that while it is permissible in the federal courts to convict upon the uncorroborated testimony of an accomplice, still I further instruct you that before convicting the defendant on the uncorroborated testimony of an accomplice, you should view their testimony with great care and caution."

This instruction, for the reasons already given, is clearly not sound law.

At page 149 of their brief, counsel set out instruction No. 35 in this language:

> "You are further instructed that the testimony of accomplices, if you should believe

> and be satisfied beyond all reasonable doubt and to a moral certainty that Marsha Warrington and Lola Norris, or either of them, were the accomplices of the defendant, should be received with caution and weighed and scrutinized with great care by the jury, &c."

That instruction would have been erroneous, if for no other reason than that it would have misled the jury into the belief that by some possibility they could find under the testimony that Lola Norris was an accomplice of the accused, Caminetti.

The same objection would apply to instruction No. 101, shown on page 150, in this language:

> "You are hereby instructed that the testimony of one accomplice cannot be accepted as sufficient corroboration of the testimony of another accomplice."

As shown by the testimony there was neither one accomplice nor two. At all events, there were not two.

Instruction No. 102, shown also on page 150, contains the following language:

> "You are hereby instructed that if you believe the testimony of Marsha Warrington and Lola Norris, or of Marsha Warrington or Lola Norris, then they are both accomplices with the defendant, &c."

The instruction as worded would have been absolute error. Neither one nor both of the victims were accomplices of the conspirators who were aiding in their unlawful transportation.

The instructions numbered 32 and 33, shown at pages 148 and 149 of counsel's brief, were statements of abstract propositions of law which had no legitimate bearing on the pending investigation to be made by the trial jury, and they were misleading for the reason that they invited the jurors to believe that both girls were possible accomplices of Caminetti and participants in his crime, in effecting or in aiding in effecting their own transportation for immoral purposes, in interstate commerce.

IF THE GIRLS WERE ACCOMPLICES, REFUSAL TO GIVE WARNING INSTRUCTION CONSTITUTED NO ERROR.

Furthermore, if both girls were in very fact accomplices, the refusal of warning instruction upon the subject was not error. Failure to give could not in any event constitute prejudicial or reversible error.

The case in no aspect was that of a conviction secured or sought on the uncorroborated testimony of an accomplice. Besides, if it were, there is no federal statute or rule of law which precludes such conviction. The jury in any event, under the federal procedure, if they believed the accomplices' testimony, could convict, and in this connection we invite attention to *12 Cyc.* 453:

> "In the absence of a statute, the credibility of an accomplice is for the jury, as is the case with all evidence. No common law rule forbids a conviction upon the uncorroborated

> testimony of an accomplice, if his evidence satisfies the jury of the guilt of the accused beyond a reasonable doubt. Hence, although the uncorroborated testimony of an accomplice should be received and considered by the jury with caution, and the court should, and usually does, instruct them to that effect, *they may, in the absence of a statutory provision to the contrary, convict upon the evidence of an accomplice alone, although uncorroborated.*"

In many jurisdictions, however, statutes expressly provide that no conviction shall be had upon the testimony of an accomplice, unless it is corroborated in some material part by the other evidence tending to connect defendant with the commission of the offense.

The very language quoted by counsel at page 162 of their brief, shows that the giving of such warning instruction is *in the discretion* of the trial judge. They quote from Sec. 380 of *Greenleaf on Evidence,* 6th Ed., as follows:

> "But on the other hand *judges in their discretion,* will advise the jury not to convict of a felony, &c."

The rule on this subject is referred to in

> *Steinham v. United States,* 2 Paine, 168; Fed. Cas. No. 13,355,

as follows:

> "The bill of exceptions states, that the court delivered its opinion to the jury, that they might *give a verdict for the plaintiffs, on the unsupported and uncorroborated evidence of an accomplice, if they believed he swore the*

truth. But the witness in this case was not an accomplice; he had no interest whatever in the goods, from anything that appears, or any knowledge that the defendant intended to evade the law. It was an opinion, therefore, given by the court, upon an abstract question, not applicable to the case, and if erroneous, would be no ground for reversing the judgment. But there was no error in the opinion on this point, had it been called for by the case. There can be no question but an accomplice is a competent witness. It is laid down in the books as a universal rule, that both in civil and in criminal cases, a particeps criminis may be examined as a witness, notwithstanding the immorality or the illegality of his conduct, provided he has not been convicted of any crime that incapacitates him. The objection, therefore, *resolves itself entirely into a question of credibility, and this is exclusively a question for the jury,* and comes within the rule laid down by the court. It may be proper, in many cases, for the court to caution a jury against convicting upon the uncorroborated evidence of an accomplice; but if he is both competent and credible, it would involve an absurdity to say his testimony was not sufficient to establish a fact. The rule, however, I consider well settled as authority, and the fitness and propriety of it on principle need not be urged. Starkie, Ev. pt. 4, pp. 17, 23; 2 Camp. N. P. 133. The judgment of the district court must, accordingly, be affirmed with costs."

The reason for the rule here invoked is further emphasized when we come to consider the charge given by the learned judge of the court below to the jury. In the argument made on behalf of the plaintiff in error the concession is made that in the

federal court a defendant can be convicted upon the uncorroborated testimony of an accomplice, if such evidence satisfies the jury of the defendant's guilt.

That such is the law applicable to prosecutions in federal courts is unquestioned.

Hanley v. U. S., 123 Fed. 851;
Richardson v. U. S., 181 Fed. 109;
Wong Din v. U. S., 135 Fed. 702.

If it is assumed that Marsha Warrington was an accomplice, yet it cannot be urged that her testimony was not corroborated. In all of its details, in so far as it relates to the particular offense of which plaintiff in error was convicted, it is elaborately sustained by independent proof, upon the truth of which no attack has been or can be made. The defendant himself, who testified as a witness on his own behalf, failed to contradict that portion of her evidence touching this subject, or even make any explanation concerning it.

We are therefore not dealing with a case in which a conviction was procured upon the uncorroborated testimony of an accomplice, or in which a conviction obtained is sought to be sustained only because of such evidence.

In its charge to the jury, the lower court explicitly, elaborately, fully and fairly instructed the jury as to the various rules governing the weighing of evidence and not only informed them of the presumption of innocence by which the defendant was clothed, but repeatedly told them that before they

could convict, they would have to be satisfied of his guilt beyond a reasonable doubt and to a moral certainty.

An instance of this is found in the following language:

> "* * * The law, in its charity, presumes the innocence of a defendant, and that presumption abides with him throughout the trial and until his guilt is established by the evidence. The showing of a mere probability of guilt is not sufficient. Before a conviction may be had it is incumbent upon the Government to prove the guilt of a defendant by evidence which, as I have heretofore stated, satisfies the minds of the jury beyond a reasonable doubt, and *that means by evidence which satisfies their minds to a moral certainty, and which accords with their reason and judgment to an extent which would induce them to act in the important affairs of life.* * * *" (supra, p. 32.)

When there is taken into consideration the entire charge of the lower court relating to this branch of the controversy, the inevitable conclusion is reached that no advantage of any kind would have been gained by defendant had the court specifically informed the jury that it was its duty to exercise care and caution in scrutinizing the testimony of Marsha Warrington, in the event they believed her to be an accomplice.

While we have presented this question in its every aspect nevertheless we insist that from no viewpoint can either of the unfortunate victims of

the rapacity of plaintiff in error and his confederate, be held to be an accomplice.

VI.

THE TRIAL COURT COMMITTED NO ERROR IN REFUSING TO INSTRUCT THE JURY TO ACQUIT DEFENDANT AND DENYING HIS MOTION IN ARREST OF JUDGMENT.

At pages 170 to 206 of their brief, counsel for plaintiff in error in Subdivision V, discuss the proposition thus stated.

> "The court erred in refusing to instruct the jury to acquit and in refusing to grant the motion in arrest of judgment, upon the ground that there was no evidence sufficient to justify submitting the case to the jury or to sustain the judgment of conviction."

Caminetti's counsel insist that the record disclosed no evidence that he transported or aided or assisted in the transportation of Lola Norris in interstate commerce. They also in apparent sincerity assert that the evidence failed to show any intent to violate the law under which the indictment was framed.

We shall not follow counsel through the many pages of this subdivision of their argument. In our outline of the facts above given we have indicated somewhat fully how in the various efforts of Caminetti and Diggs to possess themselves thoroughly of the persons of these two young girls, each of about the age of twenty years, and to lure them from their

homes in which they wished to remain, Caminetti was as constant, if not as brainfully efficient a factor, as his older partner in crime. In fact it was through Caminetti that the party of four was originally organized. In this connection it would be well to call attention to the testimony of Marsha Warrington shown at pages 256-7:

> "The next time I met Mr. Diggs was in the latter part of October. He phoned to me and wanted me to go out with him but I told him no, that I wouldn't go, and so finally he said that he wanted to prove what a gentleman he was, though his reputation around town might not be the best in the world, and he wanted to prove he was a gentleman and wanted to know if I wouldn't take a little ride with him and give him this opportunity. And so then I told him no, that I wouldn't go, and then he phoned to Miss Norris, or rather he found out from Mr. Caminetti that he was acquainted with Miss Norris, and he phoned to her and asked her if she would not go out for a little ride, and finally after telephoning around from one person to another, they finally agreed to go for a short ride. This was the latter part of October. We went for a ride."

That ride was the occasion of the organization of the party of four which from that night forward went at such a furious pace.

This testimony of Marsha Warrington is directly in line with that of Lola Norris on the same point, shown at pages 285-6 of the record:

> "I know Maury I. Diggs. I first became acquainted with him the last part of October of last year. That was the occasion I first went

> out with Mr. Caminetti. Mr. Caminetti rang me up on the phone one evening and asked me if I would introduce him to Miss Warrington. He said that Mr. Diggs was anxious to meet her and *he would like to make the two of them acquainted.* At that time I had heard of Mr. Diggs but I had never seen him. I said I would introduce him to Miss Warrington. I think the appointment at that time was made. * * * In any event, the four of us did meet."

From that very night the members of that party were intimately associated in their wild career of illicit pleasure. Henceforward they consituted one party of four members.

It is not necessary here to repeat the nauseating incidents that marked the career of that party from that meeting night in October, 1912, down to their discovery by Chief of Police Hillhouse of Reno in the defiled bungalow in that town.

Through all the two weeks of argument made by Diggs and Caminetti alike to induce these two girls to leave the State with them, Caminetti was active in advice, entreaty, persuasion, and in the seeking and securing of money with which to finance the trip.

Their conduct, their acts, their declarations, their conferences and conversations, all show beyond the shadow of a doubt that in every step that was taken Caminetti and Diggs were acting together as confederates, proceeding upon a mutual understanding, both seeking to accomplish the same common purpose, the taking away of the two girls for the

purpose of having illicit relations with them. The evidence is so clear, convincing and satisfying upon this subject that we are at a loss to comprehend how counsel for plaintiff in error can seriously argue the insufficiency of the evidence upon this point.

CAMINETTI THE ARCH CONSPIRATOR.

Upon this subject Marsha Warrington testified as follows:

> (229) "The meetings occurred with more frequency during the latter part of the period than the early part. During the earlier part of the period, perhaps once a week, or maybe twice a week, or maybe three or four times; during the latter part of this period we went out very frequently and met very frequently.
>
> *Mr. Caminetti called at my house.* Mr. Diggs never called at my home. Miss Norris was attending night school during the month or six weeks preceding the 10th of March, 1913. During the three or four or five weeks before I left upon the Reno trip the four of us would meet four or five times a week. *Mr. Caminetti would get me at my house. We would then meet Mr. Diggs. Then Mr. Caminetti would either go with us or would leave us and then meet Miss Norris at night school at nine o'clock, and the four of us would meet afterwards.* On the other occasions when Miss Norris did not attend school I would meet her at her home. *Mr. Caminetti and I would go after her at her home. Mr. Caminetti was known at my home by the name of Mr. Whitman.*"

Upon this same subject, Lola Norris testified:

(286) "Between that time (the first meeting of the four) and the early part of March, 1913, the four of us went out about three or four times a week. *Mr. Caminetti would come to my home after me in the name of Whitman.* Mr. Diggs came into my house once. I do not think my father was there at that time. *Outside of that one occasion Mr. Caminetti would get me.* During the time I was attending the night school three times a week, upon those nights I met the other three parties. Mr. Caminetti generally met me and sometimes Mr. Diggs and Miss Warrington were with him. *Either the three of them met me or Mr. Caminetti alone.*"

The activities of Caminetti in this regard are also shown by the testimony of the parents of the two girls.

T. H. Warrington, father of Marsha Warrington, gave the following evidence:

(232-3) "I never had met the defendant in this case under the name of F. Drew Caminetti. I knew a man by the name of Whitman. Prior to the month of March, 1913, I had known this man who went under the name of Whitman possibly four to six weeks. I first met him in my house. He called there for my daughter, Marsha Warrington. He was introduced to me by my daughter under the name of Whitman. He stated that he was employed by M. E. Winchell & Cline. That is a jobbing and retail firm in Sacramento. He gave me to understand that he was soliciting for them. He called, I should say, probably fifteen times at my house for my daughter between the time I first came in contact with him and the 10th day of March, 1913."

W. E. Norris, the father of Lola Norris, testified:

> "I do not know the defendant in this case, F. Drew Caminetti, under that name. I met him twice at the house. He was introduced to me as Mr. Whitman. * * * Shortly after that he came one evening to take Lola, as I understood it, to the theatre, and while waiting for her to get ready I invited him inside and we sat down and chatted a few moments. * * * I think he must have called quite a number of times upon other occasions. I never met Maury I. Diggs in my house. I never saw him there."

It will thus be seen that even during the early stages of the association of these four parties, Caminetti was unduly zealous even to the extent of invading the young ladies' homes under an assumed name to aid in the accomplishment of their ruin.

In the more advanced stages of the association of these parties, the same activity on the part of Caminetti is observed. Concerning the time that their departure from Sacramento was first discussed, Marsha Warrington says:

> (87-88) "Leaving Sacramento was first discussed among the four of us about three weeks previous to taking this trip to Reno. The first time, I think, we were riding in Mr. Diggs' machine when it was discussed. It was Sunday; during the afternoon, Mr. Diggs phoned to Miss Norris' home. I was there spending the afternoon with her; he phoned and said he had something very important to tell us and he wanted us to see him that afternoon; we said it was impossible as Miss Norris' mother was ill, so he said he would like to see us that night, if possible, and so, I think I saw him that night. I am not sure whether I did or Miss

> Norris did, but it was one of us. *Mr. Caminetti was right there with Mr. Diggs at the telephone. I think he talked to Miss Norris.* * * * Myself and Miss Norris said it was absolutely out of the question and we would not go."

That Caminetti participated in this telephonic communication and talked to Miss Norris is also shown by the evidence of Miss Norris, she stating:

> (292) "That discussion took place over the telephone. Mr. Diggs called us up over the telephone and discussed it. Mr. Caminetti was with him and talked also. *Mr. Caminetti also telephoned at the same time.* * * * Then Mr. Caminetti came to the phone and talked and they both said there was something we ought to know and we should come out with them no matter what would happen, that we should come out and hear what they had to tell us because it was to our advantage to know what it was, and Mr. Diggs said, I think, I am going to leave town, and I said, oh, are you, and he said yes, and he said that he and Mr. Caminetti were going to leave Sacramento and he said 'You and Marsha had better come with us'."

CAMINETTI A CONSTANT CONFEDERATE.

The following Monday night Miss Norris met Caminetti and subsequently the two of them met Diggs and his uncle. During the conversation between Miss Norris, Caminetti and Diggs, Diggs told her that he had been in hiding in the Columbia Hotel and that it was absolutely necessary that he leave town, and wanted Miss Norris and Miss Warrington to go with him and Caminetti. In these

statements Diggs was corroborated by Caminetti, who said:

> (293) "*Mr. Caminetti said that that was right; that everything that Mr. Diggs said was true and that it was necessary that we should go.* * * * During that entire hour we were discussing going away. Miss Warrington was not there that night. When I told Mr. Caminetti that I would not go away, he said 'Well, I have to go away'. He said that if Mr. Diggs went he would go with him."

And as illustrating the character of persuasion, entreaty and intimidation that was used by these two parties during this conversation, Miss Norris testified:

> (294) "Mr. Diggs and Mr. Caminetti *both* said that the police would keep us pretty busy after they left trying to find out where they had gone to and that they would make us tell every place we had ever gone with them and they would put us through the third degree and put us in a reform school."

The same character of threats were made to Miss Warrington and to both of the girls when together.

Upon this subject Miss Warrington testified:

> (243) "Mr. Diggs said there were warrants out for our arrest; that he had heard that the juvenile authorities were after us and would have us sent to a reform school or put under their jurisdiction, and he said that their wives would sue us. *Mr. Caminetti said that he had seen a policeman and he then told him it was all over town and mentioned our names. He said we had better get out of town and he said*

there was nothing to do but to get out and he and Mr. Diggs said we had to go. * * * These conversations took place during the last two weeks every time we met, about five or six times I should judge. * * * They said that we had to go with them. We said it was absolutely out of the question. We would not go. *Mr. Caminetti was present at all of these conferences. He participated in them."*

The falsity of the statements made by the two girls is shown by the testimony of M. J. Sullivan (238-242) and John S. Chambers (235-238).

As further showing the co-operation and common understanding existing between these parties between the date of the first meeting and the time that the Reno trip was taken, we find them meeting together, riding together, traveling together and visiting Diggs' offices together,—in fact the only separation shown was that created by the partition existing between two of Diggs' offices and the walls separating the rooms occupied by them on their trip to San Francisco and San Jose.

Another incident which throws some light upon the participation of Caminetti was the meeting of the four at the Columbia Hotel in Sacramento. It seems that Diggs had been in hiding in the hotel for some few days. He telephoned to Marsha Warrington requesting her and Miss Norris to come there, stating that he and Caminetti had something important to communicate to them. *Caminetti* rang Miss Norris up and made an appointment with her to accompany Miss Warrington to the hotel. On

the way to the hotel they met Caminetti, who did not go with them because according to his explanation he was afraid he was being followed by an officer, but stated that he would meet them there later. He subsequently joined them. Testifying to what occurred at this meeting, Miss Warrington said:

> (244-5) "Mr. Caminetti told about having met this detective and what he told him. The detective said he had heard that it was all over town that Mr. Caminetti and Mr. Diggs were going with us, and that their wives had our names and that he had better take his advice and get out of town. There was no other subject discussed during that half hour. *They told us we had to go with them and that they would marry us when we left Sacramento, and that after they had heard all of these things they did not think there was anything else for us to do.* * * * At the time we left the Columbia Hotel we still refused to go. We said we could not leave our parents. They said they would hear about it anyway if we stayed in town and so we might as well go away. *Both Mr. Diggs and Mr. Caminetti made that suggestion.*"

What transpired at this meeting is likewise fully testified to by Miss Norris (Record 296-8).

On the Saturday preceding the date of their departure for Reno, the four again met at the Peerless Restaurant, Diggs making the appointment with Miss Warrington, and Caminetti with Miss Norris. As between the two men the place of meeting had evidently been agreed upon. They there remained in session for three hours and a half, the

entire time being occupied in endeavoring to overcome the objections of the two girls to leaving their homes and in persuading them to accompany them. As to this Miss Warrington testified:

> (246) "They said that it was absolutely necessary that we go away; that it was the only thing to do and that we had to leave Sacramento. We both told them that we could not go; that it would kill our parents if we left Sacramento, and *they* said, well, they would get over it, or something to that effect. They brought up all these things again—all these things about the police. Before leaving the restaurant at 5:30 we said we would go."

According to Miss Norris, during this conversation Mr. Caminetti said:

> (298-9) "Their wives would sue us for alienating their husbands' affections, and would begin actions for divorces and would name Miss Warrington and me as co-respondents. Mr. Diggs said the punishment for this was a term of imprisonment for Miss Warrington and me. * * * I said I had often seen in the papers about women being named co-respondents in divorce cases and that they were not always prosecuted so vigorously, and he said it was either a case of a person having a great deal of money and being able to buy off the complaining person or that probably they were of no importance and the affair was given no notoriety, but owing to the fact that we all were connected with such prominent families in Sacramento they would make a lot of talk out of this and it would be a great scandal. *Mr. Caminetti said he knew Mr. Diggs was telling the truth when he said his father was coming up; and he also said he wouldn't be at all surprised if Mr. Diggs' father put him in*

prison and he could be made to serve a term in prison for going to my house under an alias, but that he would not leave town unless I went with him. He couldn't leave me to bear the disgrace alone. Then they said—they said their wives would start actions for divorce just as soon as they found their husbands had gone *and Mr. Caminetti said that if his wife did not, he would get a divorce within a certain length of time if his wife had not taken any action. Mr. Caminetti said we would be married after these divorces were granted."*

At the Sunday afternoon conference held between Diggs, Miss Warrington and Miss Norris, at the park in Sacramento, Diggs, in the course of his argument to persuade the girls to go, said:

(301) "That *Mr. Caminetti was at the present time getting some money to finance the trip, that he and Mr. Caminetti had an agreement between them to meet Miss Warrington that night and that we were to leave that night."*

After parting from Diggs at the park on that Sunday afternoon, the parties met by appointment at the Saddle Rock restaurant. Speaking of the meeting, Miss Norris testified:

(302) "Mr. Diggs told us that afternoon to meet at the Saddle Rock restaurant. When we reached the Saddle Rock restaurant, Mr. Diggs and Mr. Caminetti were there. They were in a box. The four of us remained together about half an hour before any member of the party separated. * * * (303) *When we agreed on Reno, just before Mr. Caminetti left, he gave me twenty dollars. I don't know whether he wanted me to buy my own or buy my own and Miss Warrington's together.* Immediately after

that Mr. Diggs said that he would buy the tickets. He said that if Miss Warrington and I went separately to buy our tickets it would be sure to cause some suspicion, and he said we would be much more likely to carry the affair through successfully if we would go all together. He said some one ought to manage the party; that if each one wanted to follow his own inclination we would never make any headway at all. *He said some one would have to manage the party and the others would have to abide by his decisions. And so Mr. Caminetti said: 'I will make you the boss', and so Mr. Diggs took charge of the party. Mr. Caminetti and Mr. Diggs were to share the expenses.* After that Mr. Caminetti left."

On Caminetti's return from the search for money with which to finance the trip, Miss Norris testifies:

(304) *"He said he had been having quite a time trying to locate the party who was to give him the money but he finally succeeded in finding him and he secured the money and we all went down to the depot again.* We reached the depot about fifteen minutes before the train left, I think. Mr. Diggs went to the ticket office and bought the tickets."

After Caminetti's departure from the Saddle Rock restaurant, the parties went to the station at Sacramento, but not meeting him, returned to the restaurant. Speaking of this circumstance, Miss Warrington testified:

(249) "After returning to the Saddle Rock restaurant and remaining there a short while we went back to the depot and met Mr. Caminetti there. That was just before the train came in that we took. The Saddle Rock res-

> taurant is about two blocks from the depot. *After meeting Mr. Caminetti at the depot Mr. Diggs said that he would go and buy the tickets;* so he said for us to stand back at the side of the building there so we could not be seen, while he went to buy the tickets and to wait there for him. *Mr. Caminetti just stood there with us. * * * I heard no objection made by Caminetti to the suggestion of Mr. Diggs that he purchase the tickets.''*

The automobile trip to San Francisco on which the girls were persuaded by the agreement on the part of Diggs and Caminetti that in San Francisco the two girls would be permitted to occupy a room together and would not be molested by the men is also persuasive evidence of the collusion and confederation existing between them and the concerted action taken thereon (see testimony of Marsha Warrington, transcript, 269-271; testimony of Lola Norris, transcript, 288-291).

This court has a right to take into consideration, as did the jury, the events transpiring after the parties located themselves upon the train on their journey to Reno, and before they were taken into custody.

From these subsequent developments alone, the jury would have been justified in arriving at the conclusion that the parties were acting together under a common understanding. We see Caminetti sitting silently by while Diggs procured and paid for the drawing-room, shortly thereafter occupied by the four. We notice that no objection of any

kind was made by Caminetti to its being used nor to the fact that one berth was to be occupied by himself and Miss Norris. After reaching Reno, after having agreed between themselves upon false names to be assumed by them, we find them together visiting a real estate office for the purpose of renting a bungalow; together registering at the Riverside Hotel; together again paying a visit to the real estate office to pay the first month's rent for the bungalow which had been rented and agreeing that the receipt should be taken in the name of Enwright (Diggs).

We also find Caminetti giving orders and paying for groceries and requesting the grocery clerk to call for subsequent orders which would be given to him by his wife, and finally we have them living together in the bungalow as husbands and wives ordinarily reside together.

That the bungalow was rented by both of them was made clear from the evidence of T. J. Peck, who testified:

> (186-7) "I first met him (referring to the defendant, Caminetti) in my office on the 10th of March last at about nine or ten o'clock in the morning, I think, or about that time. He was accompanied at that time by a man who gave his name as Enwright. *They* were inquiring for a cottage,—a house to rent. * * * *They* stated that they wanted to rent a cottage which *they* said they wanted to occupy for several months. * * * *It was finally rented by these two individuals.* It was rented at $35 a month. There was some rent paid; the first

month's rent, $35, was paid. They did not specify the exact number of months they desired to rent the cottage for. * * * They said something as to whether they were married; *they spoke of their wives. I think each of them spoke of their wives.* * * *."*

This witness further testified:

(199) "There was a point which occurs to my mind which rather fixes the point that the defendant and the man known as Enwright were present at the time the rent for this cottage was paid and that is at the time the rent was paid I asked to whom I should make the receipt. I addressed myself to both of them and I believe they both agreed that it should be made to Mr. Enwright."

On cross-examination, page 200, this witness further said:

"I am positive they were both there at the time I made that receipt out, because I asked who shall I make this receipt out to, whether to one party or both of them, and one of them said it didn't make any difference 'You can make the receipt to Mr. Enwright'."

With reference to the ordering of the groceries, the witness F. M. Miller, page 194, testified:

"I first came in contact with either of these two men, the man known as Ross (Caminetti) and the other man admitted to be Maury I. Diggs, when I delivered a load of groceries to 235 Cheney Street. * * *

Q. By whom were the goods ordered, if you know?

A. By Mr. Ross.

Q. On how many occasions were goods ordered?

A. Probably three or four times.

* * * * * * *

At the time I obtained the orders at the grocery store, the order was given Mr. Ross, I think. Mr. Ross paid for the first order I took over there. I think the ladies paid for one or two. The other individual, whom it is admitted is Maury I. Diggs, did not pay for any of the groceries to my knowledge. * * *

Q. Did the man who you knew as Mr. Ross, the defendant in this case, say anything to you concerning the ladies located at the cottage?

A. He asked me to call and take orders after the first order I had taken there. There was no phone in the house. He said his wife would order what they needed."

In view of the testimony just above specially noted and the other testimony in the record, the trial judge thus charged the jury on this subject:

"As to the question which has been argued by counsel whether the evidence is sufficient to show that the defendant transported or aided or assisted in transporting these girls to Reno, you will understand that it is not necessary to sustain this charge that the defendant be shown to have himself paid for the tickets or other expenses of that trip. *If he contributed to the means of paying such expenses or if it was understood between himself and Diggs that he was thereafter to contribute thereto by reimbursing Diggs, this would be sufficient on which to sustain the charge that the defendant aided and assisted in such transportation.*"

In presenting their argument in support of this point, it is insisted that the lower court committed error in permitting the witnesses to testify to the acts, conduct and declaration of Diggs, it being

complained that the prosecution was not one for conspiracy, and that, therefore, nothing said or done by Diggs would be binding upon Caminetti. No authorities are cited in support of this argument and none entitled to serious consideration can be found.

PRECONCEIVED CONCERTED ACTION ASSERTED AND ESTABLISHED.

It was made apparent to the trial court, and it is manifest from the record already quoted, that the case was not being tried upon the theory that there was no connection between Diggs and Caminetti.

From the inception of the trial until its close, the Government persistently and insistently urged that the flight to Reno was the result of the preconceived and concerted action of both Diggs and Caminetti, striving together at all times towards achieving the common purpose, which was subsequently accomplished, that these girls should accompany them out of the state and live with them in illicit intercourse. If the evidence introduced was compatible with this claim, and indeed it is at variance wth any other theory, then the testimony objected to was clearly admissible even though no conspiracy was alleged in the indictment.

That this was the prevailing idea in the mind of the court is shown by the language used in

passing upon some of the objections, the court saying:

> "The COURT. The objection is overruled. The evidence tends to show, Mr. Woodworth, that this was a transaction in which four people were engaged,—the defendant and another man and the two girls; of course, under such circumstances, the declaration of any one of them made in the presence of the other may be permitted to go before the jury, all the circumstances being shown, and the jury will determine whether or not what was said affects the others, by ascertaining whether any denial of the circumstances was made, and the other circumstances which would tend to show whether the declaration of the one was intended to apply to the understanding of the others as to what the transaction involved. In such a case it is very much like a prosecution for conspiracy, only here, of course, it is admitted simply because and only because it is made in the presence of the defendant—made either by or in the presence of the defendant * * * " (p. 217).

And again, in passing upon another objection, the court said:

> "The COURT. * * * The evidence of the Government tends to show that it was a transaction that really was united in by these four different people—that is, I mean the history of the transaction out of which the offense is charged, and I am inclined to think that in such an instance, very similar to the rules showing conspiracy, that you may show all the circumstances" (pp. 252-3).

And that the court was but following well recognized legal principles, frequently declared and consistenty adhered to, can be gathered from the numerous decisions of federal and state tribunals.

It is axiomatic that where it is claimed that crime has been committed as the result of concerted action or a preconceived design on the part of several, the acts, declarations and conduct of all in furtherance of the common purpose, are admissible in evidence upon the trial of one of the parties charged with the commission of the crime, even though no conspiracy or crime is alleged in the indictment and even though the defendant is not present at the time the declarations are made or acts committed.

St. Clair v. U. S., 154 U. S. 134; 38 L. Ed. 936-943.

"Exceptions were taken at different stages of the trial, to the admission against the objection of the accused, of evidence as to the acts, appearances and declarations of Sporf and Hanson. *These exceptions seemed to rest upon the general ground that the indictment did not charge St. Clair, Sporf and Hanson as co-conspirators. The evidence was not, for that reason, to be rejected.* St. Clair, Sporf and Hanson were charged jointly with having killed and murdered Fitzgerald. The acts, appearances and declarations of either, if part of the res gestae, were admissible for the purpose of presenting to the jury an accurate view of the situation as it was at the time the alleged murder was committed. Circumstances attending a particular transaction under investigation by a jury, if so interwoven with each other and with the principal fact that they cannot well be separated without depriving the jury of proof that is essential in order to reach a just conclusion, are admissible in evidence.

'These surrounding circumstances constituting part of the res gestae' Greenleaf says, 'may always be shown to the jury along with the principal fact, and their admissibility is determined by the judge according to the degree of their relation to that fact, and in the exercise of his sound discretion; it being extremely difficult, if not impossible, to bring this class of cases within the limits of a more particular description.' (1 Greenleaf on Evidence, 12th Ed. sec. 108; see also, 1 Bishop Criminal Proc., Secs. 1083-6.) 'The res gestae' Wharton said, 'may be always defined as those circumstances which are the undesigned incidents of a particular litigated act, and which are admissible when illustrative of such act. These incidents may be separated from the act by a lapse of time more or less appreciable. They may consist of speeches of any one concerned, whether participant or bystander; they may comprise things left undone, as well as things done. *Their sole distinguishing feature is that they should be the necessary incidents of the litigated act; necessary in this sense, that they are part of the immediate preparations for, or emanations of such act, and are not produced by the calculating policy of the actors.* In other words, they may stand in immediate causal relation to the act—a relation not broken by the interposition of voluntary individual wariness seeking to manufacture evidence for itself. Incidents that are thus immediately and unconsciously associated with an act, whether such incidents are doings or declarations, become in this way evidence of the character of the act'.''

Wiborg v. U. S., 163 U. S. 556; 41 L. Ed. 298.

''There was other evidence of declarations of members of the party as to their purposes,

and the district judge in commenting thereon said that, *'if these men were in combination to do an unlawful act, what was said by any of them at the time in carrying out their purpose was evidence against them all as to the nature of the expedition'* and to this rule an exception was taken. The general rule was stated in Sundry Goods, Wares and Merchandise v. United States, 27 U. S. 2 Pet. 358, 365, by Mr. Justice Washington, speaking for the court, that 'where two or more persons are associated together for the same illegal purpose, any act or declaration of one of the parties, in reference to the common object, and forming a part of the res gestae, may be given in evidence against the others.' The declarations must be made in furtherance of the common object, or must constitute a part of the res gestae of acts done in such furtherance. Assuming a secret combination between the party and the captain or officers of the Horsa had been proved, then, on the question whether such combination was lawful or not, the motive and intention, declarations of those engaged in it, explanatory of acts done in furtherance of its object, came within the general rule and were competent." (Citing St. Clair v. U. S., supra; People vs. Davis, 56 N. Y. 102; Lincoln vs. Claflin, 74 U. S. 7 Wall. 132; 1 Greenleaf on Evidence, Sec. 111; Starkie Evidence, 466.)

In

People v. Lane, 101 Cal. 517,

it is said:

"The evidence of acts and declarations of Dynelly was competent and material. *There was evidence tending to show joint preparations on the part of the defendant and Dynelly to kill Foulk.* The two men on the picnic grounds, prior to the shooting, had approached

the deceased together with revolvers drawn. Proof of a conspiracy, like any other fact, may be accomplished by circumstantial evidence. Our attention has not been called to any act or declaration on the part of Dynelly, which was inadmissible, if the jury believed, as they might well believe under the evidence, that there was a conspiracy between him and the defendant to kill Foulk."

State v. Williams, 113 Pac. (Wn.) 780.

Held:

"Even though no conspiracy be charged in the information, and the defendants are separately tried, evidence of conversations and statements of a co-defendant are admissible in a prosecution for obtaining money under false pretenses where there was a concerted action between them." (Citing cases.)

State v. McCahill, 33 N. W. (Iowa) 599.

There it is said:

"Evidence was introduced by the State against defendant's objection, tending to prove the acts of violence and threats of the strikers with whom defendant was associated at the time preceding the homicide. We think the evidence competent to show the purpose of the strikers to use violence in order to accomplish their unlawful purposes. As defendant acted in concert with the other strikers, to effect the purpose common to all, the evidence was competent to establish that purpose.

Many other objections are urged to the rulings of the district court upon questions relating to the admission of testimony. Some of these objections are based upon the ground that the evidence objected to, tends to establish 'other offenses.' *They tend to show un-*

lawful acts done in the execution of the plans and purposes of the defendant, and those with whom he acted in concert; thus tending to show the existence of a conspiracy, and that the homicide was done in the unlawful prosecution of its plans and purposes."

State v. Kennedy, 75 S. W. (Mo.) 979.

Held:

2. On the trial for murder under an indictment which charges defendant alone with the crime, and contains no averment of a conspiracy between her and third persons to commit the crime, evidence showing the conspiracy is admissible.

3. Where a conspiracy to the satisfaction of the trial judge is shown to have existed, the statements and acts of each conspirator, made or done in pursuance of the common design prior to the commission of the crime, may be shown against the others on their trial for the crime.

State v. Lewis, 79 S. W. 671.

"Where two defendants in a murder case were charged as principals, the declarations of one of them, at the time of the killing, were admissible under the information against the other. *It is well settled that the declarations and admissions of an accomplice in crime, made while the conspiracy exists, are admissible in evidence against an accomplice, and in order to render such evidence admissible it is not necessary that the information allege that a conspiracy existed."* (Citing State v. Kennedy, 75 N. W. 679.)

Goins v. State, 21 N. E. 477 (Ohio).

"The admissibility of acts and declarations of a third person depend upon their having been made by a co-conspirator in furtherance of the common purpose. Much latitude is necessarily left to the trial court in determining whether or not there has been introduced sufficient prima facie proof of a conspiracy to admit evidence of the acts and declarations of one claimed to be a co-conspirator to the defendant on trial. In the case at bar there was some evidence of a common purpose. There being some evidence of a common purpose, the declarations of a co-conspirator in furtherance of it was competent evidence and the court did not err in permitting it to go to the jury. Counsel contend that, to render the acts and declarations of a co-conspirator competent evidence, the indictment should have, in express terms, charged a conspiracy. This is true where the act of conspiring is itself the crime charged; but, where some other act is the real offense, and the conspiracy is a common purpose leading to the commission of the main criminal act, a conspiracy need not be alleged in express terms, and, if any allegation in respect thereof is at all necessary, the charge in the indictment that it was jointly done is sufficient for that purpose.

Nor need the conspiracy be one to commit the identical offense charged in the indictment, or even a similar one; it being enough that the offense charged in the indictment was one which might have been contemplated as a result of the conspiracy."

To same effect see:

State v. Payne, 10 Wn. 545; 39 Pac. 157;

State v. McCann, 16 Wn. 249; 47 Pac. 443; 49 Pac. 216;

State v. Dilley, 44 Wn. 207; 87 Pac. 133;
Goins v. State, 46 Ohio St. 457; 21 N. E. 476;
State v. Montgomery, 56 Iowa 195; 9 N. W. 120;
State v. Walker, 98 Mo. 95; 9 S. W. 646;
State v. McGee, 81 Iowa 17; 46 N. W. 764.

The admissibility of the evidence introduced on the part of the Government, some of which has already been alluded to, being established, it follows as a necessary corollary that there is not only sufficient proof to charge Caminetti with responsibility for transporting and assisting in the transportation of Lola Norris for the purpose laid in the indictment, but that no other conclusion could have been legitimately reached. In fact it was Caminetti's intention to himself pay for the transportation of Miss Norris and Miss Warrington, Miss Warrington testifying:

> (248) "After Reno was agreed upon, at first, Mr. Caminetti gave Miss Norris $20. *He said for her to get the ticket for herself and me,* and Mr. Diggs said no, he thought that he should be boss of the four and he thought he had better get the tickets. Miss Norris kept the money. Mr. Caminetti said 'All right. you can be the boss'. That was said to Mr. Diggs. The way I understood it, Mr. Diggs wants to spend his money and then when he ran short, then Mr. Caminetti was to spend his money. Mr. Caminetti said he thought we ought to go separately. And then Mr. Diggs said no, that would bring about confusion and he thought it would be better if we should all go together. *At the time that Mr. Caminetti suggested that*

we should go separately he suggested that we should meet at the destination presumably. To take the same train but keep apart."

See also Transcript, pp. 266-267.

As to this matter Miss Norris testified:

(303) "When we agreed on Reno, just before Mr. Caminetti left he gave me $20. I don't know whether he wanted me to buy my own or to buy my own and Miss Warrington's together. Immediately after that Mr. Diggs said that he would buy the tickets. He said if Miss Warrington and I went separately to buy our tickets, we would be sure to cause some suspicion and he said we would be much more likely to carry the affair off successfully if we would all go together; he said somebody ought to manage the party; that if each one wanted to follow his own inclination we would never make any headway at all; he said some one would have to manage the party and the others would have to abide by his decisions, and so *Mr. Caminetti said, 'I will make you the boss' and so Mr. Diggs took charge of the party. And Mr. Caminetti and Mr. Diggs were to share the expenses."*

Thus we have seen that even after Diggs had stamped his disapproval upon the suggestion of Caminetti that Miss Norris should, with the $20 just given her, purchase a ticket for herself and Miss Warrington, he nominated Diggs as boss of the party and agreed that the four of them should go together. At the same time and because of this change in plan, he agreed that the expenses of this joint venture should be borne by both and we have already shown by apt quotations from the testimony

how, after the party reached Reno, this arrangement and understanding was carried into effect by Caminetti sharing certain of the expenses.

It is idle for counsel to assert that no offense was committed by Caminetti because, before he was called upon to contribute any moneys towards the common cause, he might have repented. Like in many other classes of cases, when that stage was reached, repentance would have come too late.

So far as the charge here is concerned, it could make no difference whether Caminetti did or did not subsequently make any contribution, for by the time the party reached Reno,—in fact, the instant the train upon which they were riding passed over the State line—the offense had already been committed.

Mere payment of the railroad fare and for the Pullman tickets was a negligible quantity as compared with the mass of evidence inculpating both Diggs and Caminetti in the commission of the acts denounced by the White Slave Traffic Act.

THE IMMORAL PURPOSE FOR WHICH LOLA NORRIS WAS TRANSPORTED BY THE DEFENDANT WAS CONCLUSIVELY SHOWN.

The further contention is advanced by plaintiff in error in presenting this point, that the evidence fails to show that there was any immoral purpose connected with the transportation of Lola Norris into Nevada until after the parties had passed from California into that State.

This proposition is without foundation in fact and is equally devoid of merit.

In determining the intent with which the defendant transported and assisted in the transportation of Lola Norris from her home in Sacramento to Reno, the jury were entitled to take into consideration all of the evidence in the case. Even though the record were silent as to any declaration or statement made upon that subject, nevertheless from the acts and conduct of the parties, before and after reaching Reno, or from either, the jury would have been warranted in finding that the purpose was an immoral one and the one specified in the indictment.

The evidence here, however, specifically attests that the dominating idea in the mind of the defendant in having Lola Norris accompany him to Nevada was to there sustain illicit relations with her.

Upon many occasions before the night of March 10, 1913, the defendant in his endeavors to persuade Miss Norris to leave her home, told her that his relations with his wife were and had been unhappy; that a divorce would shortly be granted and that he would marry her. Upon this point Miss Norris testified:

> (287) "Mr. Caminetti always told me that he was not living happily with his wife. He told me that on a great number of occasions. He told me several times that he and his wife were just about agreed to separate. I think he did say something about a divorce before March 1st, 1913, on one or two occasions. Prior to March 1st, 1913, he spoke to me about his feelings towards me. He told me he loved me. * * *"

And again, shortly before the parties left Sacramento, in testifying concerning a conversation between herself and Caminetti, she said:

> (295) "We were to go away with them, with Mr. Diggs and Mr. Caminetti. Upon those occasions when I and he were alone he said he was not living happily with his wife. * * * On the Saturday before we left—that was the day before—Mr. Caminetti said that his wife would start action for a divorce, he knew, as soon as she found out he was gone, and then we would be married; but before that I don't remember Mr. Caminetti saying anything about what his wife would do."

And again, on page 299:

> "When they spoke they said that their wives would start actions for divorce just as soon as they found that their husbands had gone, and Mr. Caminetti said that if his wife did not he would get a divorce within a certain length of time, if his wife had not taken any action. Mr. Caminetti said that we would be married after these divorces were granted."

The testimony of Marsha Warrington is substantially the same:

> (244-245) "*They* told us that we had to go with them and that they would marry us when we left Sacramento and that after they had heard all these things they didn't think there was anything else for us to do. That was not the first time that the subject of marriage had been referred to. They discussed it the first time they mentioned leaving Sacramento. They said they would get divorces from their wives and marry us. Mr. Diggs said he no longer cared for his wife and he was unhappy. Mr. Caminetti said the same thing. He said he

could not get along with his wife. I think they said they thought their wives were going to get a divorce, but if they did not they were going to get them anyhow."

Of course the testimony does not show that Caminetti said to Lola Norris, "I want you to come to Reno with me for the purpose of having sexual intercourse with you". Nor did he say, "I want you to go there to be my mistress or concubine". It may be that the words *"sexual intercourse"* never passed between them. But the omission to use such language is of no consequence. If it were necessary to a conviction that the prosecution should show that language of the character indicated was actually used by the person sought to be convicted, the probabilities are that but few prosecutions would result in convictions.

The average man would not thus express himself in attempting to persuade a young girl of refinement to leave the home of her parents and flee the state to sustain illicit relations with him. It can make no difference what language was used if what was said or done is indicative of the fact that the illicit relations, the immoral purpose, was his ultimate object. No precise form of words and no particular character of conduct is essential. In this case, however, the very arguments advanced by Diggs and Caminetti in their entreaties, persuasions and demands clearly portray their purpose and intent. They were both married men. If an action for divorce were commenced in California by the

wife of Caminetti, it would have taken at least four months to have procured the making of an interlocutory decree and a year longer to have obtained the entry of a final decree. No action could have been commenced by him until after he had resided in Nevada for six months, and then the publications of the summons would have required another period of ninety days. The same situation existed as to Diggs. In the meantime, according to their own statements, and demonstrated by their own acts, they were to, as they did, live in illicit relations with the two girls.

The redirect examination of Marsha Warrington was conducted for the express purpose of eliciting from her what was actually said upon the subject of their future status, at which time she gave the following testimony:

> (280) "Mr. ROCHE. I would like to ask just one question, with your Honor's permission. Q. Miss Warrington, you were asked upon cross-examination what the specific intent was with which the four of you went to Reno. What conversation was there among the four of you, yourself, Miss Norris, Mr. Diggs and Mr. Caminetti, as to what would be done by the four of you just as soon as you did reach Reno?
>
> A. *We were to live there until they secured their divorces, which would be in six months.*
>
> Q. *Live where and with whom?*
>
> A. *Mr. Diggs and Mr. Caminetti.*"

It is suggested by counsel for Caminetti that this conversation must have taken place after the train had crossed the State line. In this they are

confessedly in error. It was but a part of the many conversations in which the defendant and Diggs asserted that they would divorce their wives and marry the two girls.

But aside from this specific evidence, as was said in the case of

John Arthur Johnson v. United States of America, supra,

where the evidence disclosed that the plaintiff in error had previously sustained sexual relations with the complaining witness, and had frequently taken journeys with her for that purpose,

> "This additional evidence furnished a basis from which the jury could justifiably draw the inference that when defendant furnished the transportation he did so for the purpose of having sexual intercourse with the girl upon their arrival in Chicago, just as a jury may reject a defendant's protestation of innocence in passing counterfeits, when the evidence shows that prior to the act in question, he had habitually or frequently passed other similar counterfeits."

See also

Kulp v. U. S., 210 Fed. 249,

where the following is stated:

> "Sufficient evidence also was offered to prove his then existing intention and purpose, and it was not necessary that the words and the act indicating such intention and purpose should have been said and done within a particular geographical area. Acts done and declarations made afterward and elsewhere might be relevant to throw light upon the state of his mind

> and his will while he was furnishing the transportation and persuading the girls to take the interstate journey in question. The learned judge submitted the evidence upon this subject to the jury with proper instructions."

And when, as here, the offense charged is one that involves the criminal intent or motive of the accused, it is permissible to introduce evidence of other acts and transactions of the party upon trial, of a kindred nature, to show his intent or motive in the particular act directly under investigation, even though it may show the commission of other offenses than that for which he is being tried. Indeed, in no other way, in many cases, could the fraudulent intent or motive of the accused be established, for the single act under investigation might not alone be decisive either way, but when that act is considered in connection with other transactions of a like or similar character occurring at or near the same time, which also involved the intent or motive of the party, the intent or motive in doing the act under investigation may thus be made to appear with almost conclusive certainty.

Colt v. U. S., 190 Fed. 307;
Wood v. U. S., 10 L. Ed. 987;
Moore v. U. S., 150 U. S. 57; 37 L. Ed. 996;
Williamson v. U. S., 52 L. Ed. 278;
Thomas v. U. S., 156 Fed. 897; 17 L. R. A. (N. S.) 720;
Bryan v. U. S., 133 Fed. 495;
Olson v. U. S., 133 Fed. 849;
Commonwealth v. Jackson, 132 Mass. 16;
People v. Harris, 33 N. E. (N. Y.) 65.

While it is true that so far as the defendant is concerned, there is no evidence showing that he had sexual relations with Lola Norris prior to March 10, 1913, nevertheless it is quite apparent that this situation was brought about through no fault of his own.

That he had such relations in mind upon his nightly visits to Diggs' office, particularly upon the occasions when Diggs and Marsha Warrington would occupy one room and in that room maintain sexual relations while Caminetti and Lola Norris were in another room, would not be an illogical conclusion or inference.

That such was his purpose upon the San Francisco trip, after both Diggs and Caminetti had promised the two girls that if they accompanied them to San Francisco they would occupy one room together, is obvious. As to what transpired after the party had registered as husband and wife, and they had been assigned to their rooms, Diggs and Miss Warrington going to one room, and Lola Norris and Caminetti going to another, Miss Norris testifies:

> (289) "After we got to the rooms I thought in order to avoid the suspicion of the clerk we would remain that way until he left and that then Miss Warrington and I would occupy one room and Mr. Diggs and Mr. Caminetti another. But as soon as the clerk left the room I went over towards the door of the room which Mr. Diggs and Miss Warrington occupied, and just before I got there I heard the key turn in the lock, and I went over to the door and knocked

and I called to them but neither of them paid any attention to me. I do not know whether they heard me or not but I knocked off and on for an hour or more and finally Mr. Caminetti told me that if I did not stop making so much noise, the clerk would come up and put me out and so I stopped. The room Mr. Caminetti and I had was a bedroom. Mr. Caminetti retired. *He spoke to me about retiring. I refused to retire.* I did not sleep very much that night. I think I took my shoes off. * * * *The defendant spoke to me while I was in the room at the Grand Hotel and after I failed to attract the attention of Mr. Diggs and Miss Warrington about getting into bed.*"

And the next night at San Jose the situation was a little bit more pronounced. As to this she testified:

(290-291) "*Mr. Caminetti retired that night. He took his clothing off. I took my clothing off. Mr. Caminetti mentioned in that room that night about having intercourse. I did not submit to him. I am positive about that. When he desired me to have intercourse I said no. Mr. Caminetti knew that I never had had intercourse with any man.*"

And while the evidence fails to show that the barriers surrounding the virtue of Lola Norris had been entirely broken down prior to the Reno trip, the record is replete with evidence showing that Diggs and Marsha Warrington had had intercourse upon a number of occasions,—in Diggs' office, in his own home, during the absence of his wife, in San Francisco, and in San Jose—and that all of these acts occurred with the knowledge and constant co-operation of Caminetti.

But in determining the question of intent and motive the jury was not confined to what had occurred prior to their departure from Sacramento. They had a right to consider, and in fact could have arrived at the conclusion which they did reach upon this subject, from what subsequently occurred.

The first night that the parties were together in Reno, they occupied adjoining rooms in the Riverside Hotel. Lola Norris and Caminetti occupied one room, Diggs and Marsha Warrington the other. All of them disrobed before retiring. While even upon this occasion Lola Norris denies having maintained sexual relations with Caminetti she testified:

> (306) "While staying at the Riverside Hotel that night, *Mr. Caminetti said something about having sexual intercourse.* I did not permit him to have intercourse."

HOPE AND EXPECTATION ACCOMPLISHED.

From that night forward until their arrest, the parties occupied the bungalow rented by Diggs and Caminetti. In this bungalow there were two bedrooms. While there Miss Warrington and Diggs slept in the front bedroom, Miss Norris and Caminetti in the rear. They remained there for three nights. Upon each night, all of the members of the party disrobed before retiring. At last Caminetti accomplished the purpose long before con-

ceived by him in Sacramento. There for the first time in her life, according to Lola Norris, she had sexual intercourse with Caminetti. To this point she testified:

> (307) "*During the three nights that I was there in that bungalow I had sexual intercourse with Mr. Caminetti.*
>
> Q. *Was that the first time you ever had such sexual intercourse in your life?*
>
> A. *Yes.*"

By no "flights of oratory", by no amount of "impassioned argument", or rhetoric, were counsel able to persuade the jury that Caminetti did not, upon the first night of his residence in the bungalow, carry into effect the "*specific intent*" formed by him before taking the Reno trip. The reasoning of plaintiff in error should be less availing here.

VII.

THERE WAS NO MISCONDUCT ON THE PART OF COUNSEL FOR THE GOVERNMENT DURING THE COURSE OF THEIR ARGUMENT, NOR ANY ERROR ON THE PART OF THE TRIAL COURT IN PERMITTING SUCH ARGUMENT AS MADE. EVEN IF THERE WERE ANY SUSPICION OF ERROR OR MISCONDUCT, THE SAME WAS CURED BY THE CHARGE OF THE TRIAL JUDGE.

At pages 207 to 249 of their brief, counsel for plaintiff in error argue, in subdivision VI of their Brief, the proposition stated in this language:

> "The prosecuting attorneys committed reversible error in making improper comments and arguments to the jury, and the trial judge

likewise fell into error in permitting the prosecuting attorneys to make improper comments and arguments to the jury, and in not checking or reproving them at the time, but on the contrary in approving and endorsing the improper comments and arguments."

In support of their claim of alleged misconduct on the part of counsel, the following language of one or the other of the Government counsel is referred to. At page 207, misconduct is ascribed to Mr. Roche by reason of making the following remark:

"Mr. Woodworth would not state to you that he proposed to establish the defendant's innocence; the strongest he would go was that he would create a reasonable doubt."

Mr. Woodworth took exception to the remark of Mr. Roche.

"The COURT. I cannot recall definitely the opening statement.

Mr. ROCHE. The last remark that Mr. Woodworth made in his opening statement, the record will sustain my position, was that he expected to create a reasonable doubt in the minds of the jury as to the guilt of this defendant.

The COURT. I recall that he used that but I don't think that he stopped at saying he would raise merely a reasonable doubt."

At page 208 counsel set out the closing remark of Mr. Woodworth in his opening address, as follows:

"And, gentlemen of the jury, having established that, and having raised a reasonable doubt in your minds as to the real intent and

purpose of defendant in leaving Sacramento, in view of all the surrounding circumstances, we will ask you to give him the benefit of that doubt and acquit him."

The opening statement of Mr. Woodworth is not set out in the record. The sentence quoted from the record as having been his closing remark is not fully self explanatory. What was contained in the opening statement is nowhere made to appear, but at all events the remark made by Mr. Roche is fully justified by the closing language of adverse counsel, and if Mr. Roche were mistaken in his position as to what counsel had said, it would be a mistake or error of judgment which could not in any possible view constitute reversible error.

It frequently happens in the course of a protracted trial that counsel may be innocently mistaken as to a position taken by counsel, or as to some language used by a witness. If anything, the graver offense would be involved in making a misstatement of language supposed to have been used by a witness during his examination.

In this connection we ask attention to the case of

People v. Barnhart, 59 Cal. 402.

The opinion was by Mr. Justice Ross, then of the California Supreme Court (decided in 1881).

The following appears in the opinion:

"At the trial in the court below the district attorney, in his opening argument to the jury, stated that the witness Brown testified that defendant, shortly after his arrest, requested him

to ask the prosecuting witness, Badger, to come and see him, and that Badger testified that during such visits the defendant said, 'I would not have taken the horse if I had not been drunk' —from which the district attorney proceeded to argue an inference of guilt, whereupon the defendant's counsel objected to such action on the ground that no such testimony was given in the case. The prosecuting attorney insisted that such was substantially the testimony as given. Counsel for defendant asked that the reporter's notes be read. The court stated to counsel that its recollection of the testimony, in that regard, accorded substantially with that of the prosecuting attorney, but that *the jury were the sole judges of what the testimony, if any, in that respect was,* and directed the prosecuting attorney to proceed, suggesting that in the mean time the reporter could look over his notes, and if it was found the prosecuting attorney was mistaken, the mistake could be corrected at any time before the argument closed. The prosecuting attorney, after stating that he thought he was correct in the matter, proceeded to address the jury, but no further in relation to the matter in question—to all of which the defendant's counsel reserved an exception, without asking to put before the jury the result of the reporter's investigation of his notes.

We see no merit in the exception. *An erroneous statement of the testimony to a jury by counsel in the trial of a cause is not an error for which a new trial will be awarded.* It would be strange if it was. It often occurs that counsel do not agree as to what the testimony is. Indeed, it rarely happens that they do. It is for the jury to determine that question, and so the court told the jury in this case, at the same time affording defendant the oppor-

tunity, of which he did not avail himself, to show from the reporter's notes just what the testimony was."

A similar question arose in the case of

People v. Lee Ah Yute, 60 Cal. 95.

The opinion of the court in bank was by Mr. Chief Justice Morrison. In the course of the opinion the Chief Justice said:

"The second point made, presents an exception to remarks made by the district attorney in his closing argument to the jury; and upon this subject the bill of exceptions shows the following facts:

'Mr. Marshall said, in closing for the people, an attempt has been made to impeach the character of the witness for the people, Hugo Habner. Counsel for the defense has attacked him in a bitter tirade. He is a man of good character, and had I deemed it necessary I could have produced witnesses to testify to his good character'; to which remarks the defendant objected, and had his exception noted. Thereupon the following additional occurred:

'The COURT. It has been sought here to try the case without any exceptions; and rather than there should be any exception, the court will order the remarks of Mr. Marshall stricken out—those which were objected to'; whereupon Mr. Marshall said: 'Very well, then, the argument, so far as making any indorsement of that man's character, goes for nothing—so far, I suppose, as I stated I was prepared to defend his reputation, if it has been impeached'. The judge then said 'Yes, strike that out also'.

In the case of The People v. Runk, decided January 22, 1878, the Supreme Court had before it the question of alleged improper re-

marks made by the district attorney in his closing argument to the jury, and such remarks were made the ground of exception on appeal. The court affirmed the judgment, but filed no written opinion. The affirmance of the judgment, however, involved the decision that *the case should not be reversed, because the district attorney went out of the record, and presented views of his own in the case.* The recent case of The People v. Barnhart, 59 Cal. 402, presented a similar question, and Mr. Justice Ross, delivering the opinion of the court, there says: 'We see no merit in the exception. *An erroneous statement of the testimony to the jury by counsel in the trial of a cause, is not an error for which a new trial will be awarded.* It would be strange if it was'. *Few cases would stand the test of an appeal, if the court below is to be held responsible for every license taken by attorneys in the argument of causes.* We do not wish to be understood as saying that there may not be such an abuse in this regard, as would make it the duty of this court to reverse the judgment of the trial court, but certainly there was nothing in the case with which we are now dealing that calls for a reversal. Objection was made by defendant's counsel to the remarks made by the district attorney, and the court below at once ordered them stricken out. They did not occur again in the argument, and the court did all in its power to remove any improper influence the remarks might have produced upon the jury."

In view of the doctrine of these cases we may well insist that even if Mr. Roche were mistaken as to the attitude of counsel for the accused with reference to the condition of the testimony in the record, his remark would in no case constitute

ground for reviewing the judgment of the trial court. Neither an erroneous statement of the language of a witness, nor of the language of counsel can, in law or in reason, become the occasion for reversing a proper judgment arrived at after weeks of arduous endeavor in a trial of the magnitude here involved.

As said by Chief Justice Morrison in the case of

People v. Lee Ah Yute, 60 Cal. 97,

> *"Few cases will stand the test of an appeal if the court below is to be held responsible for every license taken by attorneys in the argument of causes."*

At all events, immediately on the occurrence of the incident, Judge Van Fleet said:

> "I recall that he used that but I don't think he stopped at saying that he would raise merely a reasonable doubt."

Furthermore Judge Van Fleet, in the spirit of caution and fairness that characterized his conduct all through the trial, in order to set at rest any controversy between adverse counsel as to such matters, and all matters as between counsel for either party and the court, repeatedly admonished the jurors that it was *their sole function to pass on all questions of fact* and to be guided by the law as declared by the court, uninfluenced by any declaration of court or counsel as to the facts, or by any declaration or contention of counsel for either side, as to the law.

The charge is incorporated in this brief at pages 23 to 44. The opening sentence of the charge is as follows:

> "I ask your careful attention while I submit to you the principles of law that obtain in this case, and when I have done so it will be your duty to observe them and apply them to the evidence for the purpose of reaching your verdict, *to the exclusion of any suggestions that may have been made by counsel either here or through the newspapers, or that may have come to your attention from any other source.*"

Further along in the charge (pp. 34-5 of this brief) the trial judge admonished the jury in this language:

> "While, as I have stated, it is the duty of the court to declare the law, and that of the jury to be governed by it in their consideration of the evidence, it is, on the other hand, *the province and right of the jury to pass upon the facts in the case* and the credibility of the witnesses. With those functions the court has nothing to do, other than to endeavor to see that only proper evidence is permitted to go before the jury for their consideration; and it is neither the right nor the disposition of the court to interfere with that duty of the jury. If, therefore, during the progress of this trial you have gathered or during this charge should gather any impression from anything which the court may have uttered in your presence, as to the views or judgment of the court on the question of the defendant's guilt or innocence, or as to the weight of any evidence or the credibility of any witness, you will disregard such impression, should it not accord with your own views, and base your finding upon your own independent judgment as to what the sum

> of the evidence discloses; and when I refer to the evidence I refer solely to such evidence as has been finally permitted to go in and remain before you for your consideration. *And in this connection I should suggest to you, gentlemen, that the statements or declarations of counsel made at the bar are in no sense evidence for your consideration. You are to confine your consideration alone to the evidence that has been admitted before you from the witness stand or in the way of exhibits or other physical objects which may have been laid before you.*"

As to the claimed mis-statement of counsel, which counsel for the plaintiff in error has aggravated into misconduct, we say, first: It is of infinitesimal consequence and could in no case constitute the basis of prejudicial or reversible error; second: The remark was evidently made by counsel in the belief that he was stating correctly the position of his adversary; third: If the matter were of such consequence that by any record it could be made a basis for reviewing the judgment of the trial court, a proper record has not been made for such review. Furthermore, if there were a record properly certifying to action on behalf of the accused to avail himself of the misconduct of counsel for the Government, the charge of the court would cure any possible infinitesimal error that might have existed.

In this connection we deem it proper to call attention to the language of the California District Court of Appeal of the First Appellate District in the somewhat noted case of

People v. Ruef, 14 Cal. App. 576.

At page 619 Mr. Justice Cooper, in speaking of the question of alleged misconduct of counsel, says:

> "The rule requiring that the remarks of the district attorney must be *willful,* not *supported by the record,* and must contain a statement of something as a fact, either by direct statement or innuendo, and further that they must have been objected to or the court's attention called to them, or else they will not be held error sufficient to reverse a case, is founded upon principles of justice and fair dealing. While such remarks when not justified might in some cases be prejudicial error and injurious to defendant, in other cases such remarks might prejudice the district attorney in the eyes of the jury. *Each case must be judged by its own particular circumstances,* and in our opinion, taking the remarks in this case, with the corrections and statements by the court, they could not have worked any injury to the defendant."

Another case of alleged misconduct on the part of the prosecuting officer is

People v. Craig, 152 Cal. 42-50.

In that case the district attorney who was apparently laboring under a misapprehension as to the condition of the record, made a statement which was not fully warranted, with reference to the conduct of the defendant. In brushing aside this alleged misconduct of counsel, the Supreme Court in bank, speaking by Mr. Chief Justice Beatty, said:

> "The alleged misconduct of the district attorney does not call for extended notice. He did in one instance claim in his argument to the jury that appellant had shown by his own testimony that he was living off the earnings of women who had consorted with Japanese.

There was no evidence as to consorting with Japanese, but on the objection of counsel the court admonished the district attorney to confine himself to the evidence. He, however, still contended that such evidence had been given by Sargent Wilson. He appears to have been mistaken, but there is no reason to suppose that he had purposely misrepresented the testimony. In such a case *the recollection of the jury as to what the testimony of a witness was must be deemed a sufficient protection to the accused.* It is not like the case where the prosecuting officer *deliberately and purposely imputes to the accused a distinct and infamous offense regarding which there has been no evidence,* and where the court approves his conduct. *As to the terms in which the district attorney chose to characterize the offenses of the defendant, we cannot see that they passed the bounds of legitimate censure.*"

EVEN IF THE REMARKS OF MR. ROCHE WERE IMPROPER AND BY ANY POSSIBILITY WERE ASSUMED TO CONSTITUTE MISCONDUCT, IT COULD NOT CONSTITUTE ANY BASIS FOR REVIEW BY THIS COURT, OR REVERSAL OF JUDGMENT.

The record on the subject of the various remarks of counsel (Mr. Roche and Mr. Sullivan), show that all that was done in each case was to *take exception* to the language of counsel. In speaking of the remarks of Mr. Roche as to Mr. Woodworth's attitude about defendant's innocence, the action taken on the part of defendant is thus noted:

(Brief p. 207) "Mr. WOODWORTH. We take exception to the remarks of counsel."

At pages 210-11, in speaking of the remark attributed to Mr. Roche—"He hides himself behind the respectability of a loyal wife", Mr. Woodworth merely noted an exception as follows (p. 211): "We take exception to the remarks of counsel as being highly inflammatory".

In referring to the remark of Mr. Roche—"The people of these United States are watching this case and waiting to ascertain whether, upon such a record as has been made here, and the law of this case as will be given to you by the court, this defendant shall go unwhipped of justice",—the only record made with reference to the alleged improper remark is—"Mr. Woodworth: We object to any such statement that the people of these United States are looking upon this case, as *inflammatory,* and intended to move the jury by passion. We except to such remarks."

At page 212, objection is made to the remark of Mr. Roche:

> "The Government of these United States, gentlemen of the jury, whom we have the honor to represent here, your Government, as well as my Government, the Government of all of us, demands that *the laws enacted for the protection and preservation of its young and decent women be adequately and rigidly enforced.* An acquittal in this case would be a miscarriage of justice and it would be a blot upon the fair name and escutcheon of California.
>
> Mr. Woodworth. Another *exception* to those remarks."

Further exception is found on the same page, to the language of Mr. Roche given as follows:

> "On behalf of myself, on behalf of the State of California, on behalf of the Government of the United States of America, I ask you gentlemen of the jury by your verdict whether you intend to do such as this.
>
> Mr. WOODWORTH. We note an exception to that."

In the case of certain language attributed to Mr. Sullivan, at page 214 and again at page 224, the exceptions noted by counsel for the accused are in substantially the same form. *In no case was the court requested to instruct the jury to disregard them,* nor did the court, after such request, refuse to do so.

The general rule on the subject of making the record on which to test the misconduct of counsel in a matter of this kind is thus stated in

12 Cyc., 585:

> "NECESSITY FOR REQUEST FOR CORRECTION: Improper remarks in argument by the prosecuting attorney, although prejudicial, do not justify reversal, *unless the court has been requested to instruct the jury to disregard them, and has refused to do so.*"

A question of this character arose in the case of

People v. Molina, 126 Cal. 505.

Mr. Chief Justice Beatty there, speaking for the court in bank, in connection with a claim of misconduct of the prosecuting attorney, said:

> "The defendant excepted to the remarks, but *made no motion to have them corrected or the*

jury instructed to disregard them. It is now claimed that the remarks were prejudicial error.

* * * * * * *

(507) The defendant excepted to these remarks, but *made no motion to have them corrected or the jury instructed to disregard them.* The instructions are not in the record, and we must presume that the court correctly instructed the jury, and that they were told to disregard all matters and statements outside the record."

In the case at bar the court instructed the jury that they were to disregard as to matters of fact, all remarks and statements of counsel, and to be guided solely by the evidence as given by the witnesses on the stand, and by the exhibits submitted in evidence before them. There was no request whatever for instructions on behalf of the defendant with reference to any of these matters. There is no evidence in the record to show that on the request for such instructions the court finally, and at the time of charging the jury, failed to comply with such request.

In speaking of the alleged misconduct of counsel in that case, Mr. Chief Justice Beatty said:

(507) "The rule is well settled that it is error sufficient to reverse a judgment for counsel, against objection, to state facts pertinent to the issue and not in evidence, or to assume in argument to the jury such facts to be in the case when they are not. (People v. Mitchell, 62 Cal. 412, and cases cited.) In this case, even with no evidence in the record, where the life of a fellow-creature is at stake, we would have no

hesitation in reversing the case if the remarks were erroneous when measured by the above rule, but they are not. There is no statement of any fact pertinent to the issue not in evidence. There is no charge against the character of defendant or his good name. There is no charge that he has been guilty of any offense or offenses other than charged in the information. The district attorney may have drawn upon his imagination as to the cessation of crime in Kern county after 1877, and as to the jury system being claimed by many to be a failure, but we cannot see how the remarks could have injured the defendant. The matters spoken of were probably as well known to the jury as to the district attorney before he made the statement. It does not appear to us whether they were in the record or not.

In the leading case of Tucker v. Henniker, 41 N. H. 323, it is said: 'The right of discussing the merits of the cause, both as to the law and facts, is unabridged. The range of discussion is wide. He may be heard in argument upon every question of law. In his addresses to the jury it is his privilege to descent upon the facts proved or admitted in the pleadings; to arraign the conduct of parties; impugn, excuse, justify, or condemn motives, as far as they are developed in the evidence; assail the credibility of witnesses, when it is impeached by direct evidence, or by the inconsistency or incoherence of their testimony, their manner of testifying, their appearance on the stand, or by circumstances. His illustrations may be as various as the resources of his genius; his argumentation as full and profound as his learning can make it; and he may, if he will, give play to his wit, or wings to his imagination'."

In concluding the opinion, the Chief Justice uses this language:

> "In this case, the record is entirely silent as to what action the court took in regard to the remarks and as to any instructions to the jury in regard to them. If the remarks were objectionable, and the record fails to show whether or not the court corrected the statement, it will be presumed here that the statements were corrected and the jury instructed to disregard them."

The rule on the subject is again referred to by Mr. Chief Justice Beatty, speaking for the court in bank in

People v. Shears, 133 Cal. 154-159.

The fifth subdivision of the syllabus is as follows:

> "A remark by the district attorney, to the jury, that it never occurred to him that the defendant was dazed, and that he had seen him the next day, was improper; but where the defendant did not invoke the action of the court to instruct the jury that it was improper, and to disregard it, but *merely excepted to the remarks of the district attorney, the impropriety is not ground for reversal of the judgment* upon conviction of manslaughter."

At page 159 the Chief Justice says:

> "The district attorney, in his address to the jury used this language: 'It never occurred to me that the defendant was dazed, and I saw him the next day'. This was improper, but its effect would have been removed if the defendant had asked the court to instruct the jury

> that it was improper, and to disregard it. *He did not invoke the action of the court, but contented himself with excepting to the remarks of the district attorney.*"

The objection to alleged misconduct was overruled and the judgment of the lower court affirmed.

A similar ruling was made by the Supreme Court of Washington in

State v. Regan, 36 Pac. 472.

In disregarding the alleged misconduct of counsel and affirming the judgment in that case, the Washington Supreme Court said:

> "In making closing argument to the jury, counsel for the prosecution said, purporting to recite a part of the testimony, 'He (Regan) says to Hines, 'We are going to be arrested.' It is contended that this is error, for the reason that there is no evidence of any such statement in the record. Counsel for the defendant excepted to it, but it does not appear that he *moved to strike it out or asked the court to instruct the jury to disregard it. Consequently there is no foundation for any error in the premises.* Furthermore, it does not appear that such statement could have been prejudicial to the defendant, in any manner."

A similar ruling was made by the Supreme Court of Nevada in

State v. O'Keefe, 43 Pac. 918-919.

Another case recognizing this rule is

Collins v. State, 148 S. W. 1065,

decided by the Texas Court of Criminal Appeals in 1912. This is evidently the same case intended

to be referred to by counsel at page 213 of their opening brief, cited as *Collins v. State,* 145 S. W. 1065.

At page 1070 (S. W. Rep.), the court says:

> "In bill No. 5 it is shown that the prosecuting officer in his argument stated, 'Gentlemen of the jury, if you don't convict the defendant in this case, there is no use for the grand jury of your county to hereafter indict any man for the detestable crime of assault with intent to rape committed in your county.' The court instructed the jury not to consider these remarks as they were improper. *Appellant presented no special charge,* and, as the court instructed the jury not to consider the remarks, they are *not of such character as would present reversible error.* Edwards v. State, 61 Tex. Cr. R. 315, 135 S. W. 540, and authorities there cited."

Another case in which the rule is referred to is

> *Edwards v. State* (Tex. Cr. App. 1911), 135 S. W. 540-4.

The 14th subdivision of the syllabus is as follows:

> "Defendant cannot object on appeal to alleged misconduct of the state's attorney in argument, *in the absence of a request for instructions with reference thereto."*

And, in the opinion of the court, at page 544 the following is found:

> "Complaint is made of the argument of counsel for the state. Defendant did not request any instructions, yet the court in its charge told the jury: 'If in his argument any attorney for the state has represented the law to be

different from that given you by the court, or has misstated the evidence in any way not supported by the record in this case, then in such event you will not consider such portion of such argument.' In Renfro v. State, 42 Tex. Cr. R. 407, 56 S. W. 1019, the court says: 'Defendant complains of the argument of state's counsel. *The objection cannot be considered because no special requested instruction was asked by appellant,'* citing Monticue v. State, 40 Tex. Cr. R. 528, 51 S. W. 236; Levine v. State, 35 Tex. Cr. R. 647, 34 S. W. 969; Wright v. State, 37 Tex. Cr. R. 146, 38 S. W. 1004."

A late California case on the subject is

People v. Babcock, 160 Cal. 537.

In that case the defendant relied on misconduct of counsel which did not avail him on appeal. In disposing of his contention the court in bank, speaking by Mr. Justice Angellotti, said:

> *"Furthermore, defendant is in no position to avail himself of the claim of misconduct of the district attorney in this matter. He in no way invoked any action on the part of the trial court to obviate the effect of the statement, and the statement was of such a nature that any improper effect could have been avoided. He simply noted an exception to the remarks of the district attorney,* as was the case in People v. Shears, 133 Cal. 159, where the district attorney made an improper statement. This court said: 'This was improper, but its effect would have been removed if the defendant had asked the court to instruct the jury that it was improper, and to disregard it. *He did not invoke the action of the court, but contented himself with excepting to the remarks of the district attorney,'* and the judgment was affirmed."

The judgment in the Babcock case was likewise affirmed.

A late decision by the District Court of Appeals is

People v. Warr, 22 Cal. App. 663.

At page 669 the court says:

> "The deputy district attorney in his argument to the jury, and in the heat of his exhortation, went outside the established path marked out for prosecuting officers when he said: 'But, gentlemen, *can you turn this man loose on the streets of this town and go home and sleep quietly in your beds?* You may think, 'well, he won't come to my place,' and he may not; but I hope to goodness if you do, *I hope you will have the experience with him that we had.'* But here again the defendant *failed to make any request to the court that the jury be instructed to disregard the language of the prosecutor, and so failed to lay any foundation for a review of the objection,* as was the case in People v. Shears, 133 Cal. 159. And conceding that there are cases where the misconduct may be of such a nature as to render an instruction from the court to the jury directing that no attention be paid to it, futile and unavailing, and therefore unnecessary to be asked for, the situation presented here does not illustrate such an instance. There may well be times when the judge, by a clear intimation as to his opinion as to facts of a case, improperly made to a jury, could not, by following the misconduct with a direction to the jury to disregard it, effectually clear the minds of the jurors of a prejudicial impression; but it very seldom happens that a mere observation of an attorney, expressed during the heat of his oration, fastens itself with such tenacity upon the minds of the jurymen as not to be dislodged by a direct instruction from the trial judge."

Another late case of like effect, decided by the California District Court of Appeal, of the Third Appellate District is

People v. Stein, 23 Cal. App. 109.

In this connection see also

People v. Ye Foo, 4 Cal. App. 743;
People v. White, 5 Cal. App. 336;
Pearl v. State, 63 S. W. 1013-1917;
Moore v. State, 4 Tex. Cr. R. 70 S. W. 89;
Holt v. U. S., 218 U. S. 245; 54 L. Ed. 1020-9.

CAMINETTI HIDES BEHIND THE RESPECTABILITY OF A LOYAL WIFE.

At page 210 counsel for plaintiff in error designate as "inflammatory" the remark of counsel for the Government thus expressed: "He hides himself behind the respectability of a loyal wife." Why the remark should be considered inflammatory surpasses our ken unless it be that the suggestion of anything pure and undefiled is like a red rag to a bull, in the case of plaintiff in error. The poor wife whose loyalty had been strained almost to the breaking point, had smothered her pride and her sorrow sufficiently to render the aid of her personal presence and her voice, so far as she could truthfully, to shield him from the just and lawful consequences of his infamously cruel treatment of her.

It appears at pages 396-9 that she was a witness on his behalf, testifying simply to his nervous con-

dition and his peculiar actions during the days immediately preceding the Reno excursion. Welcoming the generous aid of a noble woman, whom he had deliberately insulted and spurned, it was natural and proper that adverse counsel should say, as the fact was, "he hides himself behind the respectability of a loyal wife." The remark was objected to on the ground that the same was inflammatory and not based on facts. The remark cannot be properly characterized as "inflammatory"; it certainly was not misconduct of counsel, nor was it claimed to be by counsel for the accused at the time.

ABANDONMENT OF HIS WIFE BY CAMINETTI.

At page 211 of their brief, counsel for plaintiff in error make another inflammatory objection to the remark thus expressed by Mr. Roche in his argument:

> "He deserted and abandoned his family and left them without a dollar because on the date that he did abandon them, he assigned to some third party every dollar due him from the Board of Control.
>
> Mr. WOODWORTH. We take an exception to the remarks of counsel as being highly inflammatory."

The fact is exactly as Mr. Roche stated it. The witness O'Brien, speaking of Caminetti, at page 382, says: "At the time he took the trip to Reno he owed me money." At page 383 the witness said:

> "I remember the day he resigned his place on the Board of Control, the day he left for Reno.

Q. On that day did he borrow money from you on a salary demand for the month of March?

A. No, sir, he did not.

Mr. SULLIVAN. Q. You say he did not borrow from your firm on his salary demand?

A. He cashed a couple of checks with my firm but not with me. * * * I saw the checks the next day."

The witness Tehany was questioned with reference to this same matter at pages 196-7. On page 196 he identified a paper, the contents of which is shown at page 197. Speaking of the handwriting he says:

"I recognize the handwriting upon the document, or rather a letter dated March 10th, 1913 signed 'Drew Caminetti'. The signature is in the handwriting of Drew Caminetti, the defendant in this case. I brought this document to San Francisco this morning.

'The Lotus. . O'Brien & Austin.

To the State Controller:

Herewith I hand you my resignation as clerk of the State Board of Control. Please see that my warrant is delivered to Sacto. Valley Trust Co. today to cover checks drawn tonight.

Yours truly,

Drew Caminetti.'

Q. What was the salary of Mr. Caminetti as clerk of the State Board of Control?

A. $150 a month.

Q. What amount of money was coming to F. Drew Caminetti on the day on which that resignation is dated?

A. $45."

WHILE CAMINETTI AND DIGGS CLAIMED THAT THE OFFICERS OF THE JUVENILE COURT OF SACRAMENTO HAD ISSUED, OR WERE ABOUT TO ISSUE WARRANTS FOR THE ARREST OF THE WARRINGTON AND NORRIS GIRLS, THE FACT WAS THAT THE PARTIES UNDER INVESTIGATION BY THE OFFICERS OF THAT COURT WERE YOUNG GIRLS OTHER THAN LOLA NORRIS AND MARSHA WARRINGTON.

At pages 233-4, counsel for plaintiff in error thus refer to a remark made by Mr. Sullivan in his closing argument:

> "Mr. SULLIVAN. Now, gentlemen, we come to the other question. Now and then through the case there was a reference directly or indirectly made to it. They were frightened. But, gentlemen, not so much frightened by reason of their relations with Lola Norris and Marsha Warrington, but they were frightened because they had ruined other girls.
>
> Mr. WOODWORTH. We take an exception to that.
>
> Mr. SULLIVAN. Just wait a while, I will show you the record; I will show you the record.
>
> The COURT. That is the deduction which may be drawn from the evidence which is before the jury and counsel has a perfect right to comment upon it.
>
> Mr. WOODWORTH. We except."

It appears clearly from the testimony of M. J. Sullivan, probation officer connected with the Juvenile Court that the Warrington and Norris girls were not the girls whose relations with Diggs and Caminetti were under investigation. We ask attention to the record in that regard. The testimony of M. J. Sullivan is set out in the record at pages 238-242. At page 238 Sullivan said:

> "I don't know Miss Lola Norris; I know her by sight. I also know Marsha Warrington

by sight. I know F. Drew Caminetti by sight. I know Maury I. Diggs by sight.

Q. Prior to the 10th day of March, 1913, had any complaint of any kind or character been made, to your knowledge, to the Juvenile Court, or to any department of the Juvenile Court, regarding Marsha Warrington or Lola Norris?

(239) A. No, sir; I never knew there were any such parties in existence.

Mr. ROCHE. Q. If any complaint had been filed would you have known of it?

(240) A. Yes, sir."

At page 242 Sullivan was questioned by Mr. Woodworth as follows:

"Q. *Were any complaints made to you personally with reference to these four persons previous to the month of March, 1913?*

A. Only as to one person, Mr. Diggs; our attention was called to the fact that some girls were going into the Diepenbrock Theatre Building and also a man named Johnson—Johnson Whitman, and a man named O'Brien. *That was before the 10th day of March; that was not with reference to these girls. We have got those young ladies that they were mixed up with. We never knew there were any such parties in existence by the names of Marsha Warrington and Lola Norris.* These reports with reference to the person whom I have described as Diggs, and another one as Whitman, *was made during the time Mr. Diggs was in San Francisco.* He was before the law here. It was in regard to the automobile. I went to his attorney, Mr. Charles B. Harris, who had returned from San Francisco, and I asked him to bring Mr. Diggs to our office, that *I wished to talk with him concerning some young girls. That occurred before the 10th*

day of March, may be four or five days. It was during the time he was in San Francisco, between that and the 10th day of March. Just a week before."

It appears, therefore, that in spite of the claim to the contrary, made by counsel for plaintiff in error, the fact was actually brought out by his own counsel that girls other than Lola Norris and Marsha Warrington furnished the occasion for the investigation by the officers of the Juvenile Court of Sacramento. And yet, his counsel in the brief here on file insist that counsel for the Government sought to introduce in the argument before the jury, matters not shown by the record.

On redirect examination, Sullivan further testified:

(242) *"I discovered who Mr. Whitman was. It was Mr. Caminetti, the defendant in this case. I subsequently ascertained who the girls were. They were not either Marsha Warrington or Lola Norris. One of the girls is now in the St. Catherine's Home, an institution here in San Francisco, and the other is at home with her parents."*

Notwithstanding that the threatened warrants and the possible arrest growing out of the illicit relations of these two married men with young girls had reference entirely to persons other than Lola Norris and Marsha Warrington, both Caminetti and Diggs made it appear to these frightened girls that they were the subjects of investigation and about to be arrested and made the fear growing

out of their statements, the main argument by which to induce the girls to take their hurried trip to Reno, Nevada.

At page 243 Marsha Warrington testifies:

> "Mr. Diggs said *there were warrants out for our arrest, that he had heard that the Juvenile authorities were after us and would have us sent to a reform school,* or put under their jurisdiction, and he said their wives would sue us. *Mr. Caminetti said that he had seen a policeman and he had told him that it was all over town, and even mentioned our names, and said we had better get out of town and he said there was nothing to do but to get out and he and Mr. Diggs said we had to go.*"

Not only does the record justify the remarks of counsel for the Government, but it shows that he stated the exact truth, and it shows further the absolute falsity of the position taken by Caminetti and his confederate in making the representations to these young women by which they were induced to flee with them, as criminals, to the State of Nevada.

The record shows beyond question that, instead of being a part of the Government case to show that the defendant had been tampering with other young women and girls in advance of the precipitate retreat on Reno, it was the supreme effort of the defense to show that Caminetti and his lustful confederate had so inextricably entangled themselves in the meshes of the law that in their own judgment it became necessary that they should both leave Sacramento. The purpose of the Gov-

ernment in the examination of Sullivan, the probation officer, was to show the utter falsity of Caminetti's claim, as urged upon the two girls, that warrants had been issued out of the Juvenile Court for the arrest of the girls. Furthermore, the very questions addressed to the witness that elicited from him the known relations of Caminetti and Diggs with girls other than Lola Norris and Marsha Warrington were propounded by Caminetti's own counsel, on cross-examination. In the face of this record showing this condition of facts, it requires superb courage for Caminetti's counsel to claim, as is done in the opening brief, that the Government is at fault for bringing evidence of other escapades on the part of these two confederates into the evidence submitted to the trial jury. Not only is the testimony in the record without objection or exception by Caminetti's counsel; but it is there by their direct procurement. In any event, the language of Mr. Sullivan was absolutely warranted by the facts in the record as set there by Caminetti's own counsel. It was a statement of the exact facts, or the inferences properly and clearly inferable from those facts.

LATITUDE ALLOWED PROSECUTING OFFICERS IN ARGUMENT.

The various expressions used by counsel for the Government in their argument are absolutely within the line of legitimate argument and they are,

in every instance, as we have shown above, based on the testimony shown in the record.

Counsel, to present cases on behalf of the Government, naturally and necessarily must have latitude to make statements based on inference, and to comment freely on the facts disclosed by the record, even though those facts portray a defendant in his real character.

A case in which the rights of counsel in this regard are recognized is

United States v. Flowery, Fed. Cas. No. 15,122.

There the court said:

"The objection is merely that counsel was allowed too great latitude in arguing, *as to the inferences to be drawn from the evidence. If this were so, we should not, for that reason alone, disturb a verdict, rendered upon ample testimony, and with which the judge who presided at the trial, is entirely satisfied.*

The course of argument to be allowed, must rest in some degree, at least, upon the judicial discretion of the court. A line of argument, clearly unfounded or irrelevant, would not be permitted. But there are many cases, and especially those which are voluminous and complicated, in which it may well be presumed that *counsel perceive bearings and applications of evidence, which are not at once apparent to the court;* and when it is made a question whether the evidence tends to a certain conclusion, the views of counsel, in other words, his argument, must be heard, before the court can be called upon to decide. This will be in the presence of the jury, and it will not generally be material, whether it be in form ad-

dressed to them, or to the court; but it will conduce to the convenience and dispatch of business, that the argument should at once be addressed to the jury, and the court afterwards should give such instructions as they may deem proper."

A much more recent case was determined by the New York Court of Appeals, and is reported as:

People v. Conklin, 175 N. Y. 333; 67 N. E. 627.

The Court there said:

"The district attorney, in opening the case to the jury, stated with considerable detail, the facts bearing upon the conduct of the defendant towards his wife during the six years of their married life, as he expected to prove them. The learned counsel for the defendant objected to many of these statements, and called the attention of the court to some of them, and, upon the refusal of the court to interfere, took exceptions. Nothing was said in the opening address that exceeded the *proper limits of advocacy. The prosecuting officer has the right to try his case in the same way and subject to the same rules as other counsel. It is only when he resorts to violent denunciation, and to matters not embraced in the proofs or involved in the issue, that the court may interfere.* So long as the opening or closing address is based upon facts intended to be proved and pertinent to the issue, or upon facts which the *proof tends to establish,* the manner of presenting them must be left very largely to the good sense and good taste of the advocate, and the watchful vigilance of the trial court. *The case must be quite exceptional where a question of law, reviewable in this court, is presented, based upon the address of the prosecuting officer.*"

A somewhat noted California case bearing upon this same question is:

People v. Burke, 18 Cal. App. 72.

At page 101 the court says:

> "The district attorney's closing argument is made the subject of animadversion by appellant. It is declared that he 'threw aside all discretion and all pretense of fairness and loudly declared to the jury in substance and effect that *the people of the state of California had already found the defendant guilty and further threatened that the citizens of the state were watching and that the jury would not dare to do anything but so declare by their verdict.*' It is asserted that 'the books do not record a more flagrant instance of gross violation of a defendant's rights, or more far-reaching in its prejudicial effect'. It is apparent, though, that appellant, in characterizing and condemning the utterances of the district attorney, has manifested far more heat than did that officer, in his address to the jury. Here is what he said: *'Let us have a law that is equal for rich and poor, for those in high estate and those in low estate, and a law like that if so administered will enjoy the confidence, deserve the reverence and support of the people of our state. Tonight the people of our state look here to you. They are not looking here—those who are familiar with the facts of the case—to find out whether or not the defendant is guilty. They have conceded that he is. They are looking here to find out if a court of justice is going to declare him so.'* An exception was taken to the statements and the court said: 'That statement as to what the public or other people think about it is to be disregarded by the jury. It is not proper matter for their consideration at all.' The first part of the above extract from the address

sounds like a quotation from the Declaration of Independence and the latter part means simply that the people who are familiar with the facts of the case have already conceded that the defendant is guilty and they expect justice to be meted out to him. It contains nothing like a threat, and it could be considered by the jury only as *an expression of the opinion of the district attorney that the facts of the case were sufficient to convince anyone of the guilt of defendant. The whole argument of the district attorney necessarily implied that he believed the defendant to be guilty, and that any fair-minded man familiar with the facts must reach the same conclusion. Of course, as held in many decisions, the range of discussion, illustration and argumentation of counsel is very wide: matters of common knowledge and historical facts may be referred to and interwoven in the argument, and allusion may be made to the prevalence of crime and the duty of the jury.* (People v. Molina, 126 Cal. 507 (59 Pac. 34); People v. Glaze, 139 Cal. 159 (72 Pac. 965); People v. Soeder, 150 Cal. 12 (87 Pac. 1016); People v. Craig, 152 Cal. 50 (91 Pac. 997); People v. McRoberts, 1 Cal. App. 25 (81 Pac. 734); People v. Ye Foo, 4 Cal. App. 740 (89 Pac. 450); People v. Amer, 8 Cal. App. 139 (96 Pac. 401); People v. Ruef, 14 Cal. App. 583 (114 Pac. 57).)

But if the remarks should be considered improper, we must presume that any injurious effect was forestalled or removed by the direction of the court. (People v. Putnam, 129 Cal. 262 (61 Pac. 961); People v. Benc, 130 Cal. 165 (62 Pac. 404); People v. Shears, 133 Cal. 159 (65 Pac. 295).)

Manifestly some allowance must be made for the zeal of attorneys and some confidence reposed in the intelligence and fairness of the

jury, and it may be said, generally, that *every statement of the district attorney criticized by appellant is less objectionable than what has been held by the supreme court to be insufficient to warrant a reversal of the judgment.*"

Holt v. United States, 218 U. S. 245-254; 54 Law. Ed. 1021-1029.

The sixth syllabus is as follows:

"The conduct of a Federal district attorney on a trial for murder, in characterizing as confessions certain alleged statements of the prisoner which were excluded because they were not freely made, does not require a reversal of the conviction, where the court told the jurors that they were to decide the case on the testimony of the witnesses, and not on what counsel might say.

In the opinion of Mr. Justice Holmes uses this language:

"In his opening the district attorney stated that the prisoner admitted that a coat with soot marks upon it, and a gunner's badge were his, and was going on to recite further statements, when they were objected to. The district attorney answered that these were voluntary confessions, but that he would omit them, if objected to, until the proper time, and desisted. Objection was made to the word 'confessions', and the judge replied that he did not hear any statement that the prisoner made any confession. *No instruction was asked,* but as we have said, *the judge told the jury that they were to regard only the evidence admitted by him, not statements of counsel,* etc. The attempt to get in the evidence is criticized also as unduly pressed. We see no reason to

differ from the judge's statement upon a motion for a new trial, that the United States attorney was guilty of no misconduct. The exceptions on this point also are overruled."

Another case illustrating the latitude allowed in argument is:

People v. Ye Foo, 4 Cal. App. 742.

There the court said:

"'The range of discussion is wide. He may be heard in argument upon every question of law. In his addresses to the jury it is his privilege to descant upon the facts proved or admitted in the pleadings; to arraign the conduct of parties; impugn, excuse, fortify or condemn motives, as far as they are developed in the evidence; assail the credibility of witnesses, when it is impeached by direct evidence, or by the inconsistency or incoherence of their testimony, their manner of testifying, their appearance on the stand, or by circumstances. His illustrations may be as varied as the resources of his genius; his argumentation as full and profound as his learning can make it; and he may, if he will, give play to his wit, or wings to his imagination.' This case was referred to and approved in People v. Molina, 126 Cal. 505 (59 Pac. 34).

In People v. McMahon, 124 Cal. 436 (57 Pac. 224), the district attorney, after speaking of the defendant as 'Old Harris, the whisky seller', said that *he 'ought to be in the penitentiary',* and the court held that the language was not sufficient to call for a reversal of the case.

In People v. Wheeler, 65 Cal. 77 (2 Pac. 892), it was held not to be error when the district attorney said to defendant, *'You sought this trouble with him and made a cowardly attack on him'.*

In People v. Glaze, 139 Cal. 159 (72 Pac. 965), the language of the district attorney was (referring to defendant): *'When this foul fiend of hell sent Trewella to his Maker, the motive came from a heart as black as the crime committed.'* It was held not to constitute error.

In People v. Soeder, 150 Cal. 12 (87 Pac. 1016), the remark was: *'This man Leon Soeder would cut another man's throat any day in the week,* whether he wanted to marry Catherine Flatley or not,' and it was held not to constitute error.

In People v. Weber, 149 Cal. 325 (86 Pac. 671), the attorney general stated his *solemn belief in the guilt of defendant,* and it was claimed that he committed error, in so doing. The court said: *'A prosecuting officer, therefore, has the right to state his views, his beliefs, his conviction as to what the evidence establishes.'* (See, further, People v. Romero, 143 Cal. 460 (77 Pac. 163); People v. Salas, 2 Cal. App. 537 (84 Pac. 295); Hawkins v. State (Tex. Cr.), 71 S. W. 756; State v. Millmeier, 102 Iowa, 692 (72 N. W. 275).)"

Another recent case by the California District Court of Appeal, Third Appellate District, is:

People v. Stein, 23 Cal. App. 108.

At page 118, the court says:

"It is urged that the district attorney, in his address to the jury, was guilty of misconduct which seriously militated against the defendant by declaring that, if there ever was a case arising in his experience of six years as district attorney, *in which there was disclosed on the part of any man accused of murder 'an abandoned and malignant heart— * * * an utter abandonment * * * to regard human life as sacred— * * * it is the case of this*

defendant, Andrew Stein, on trial here today for his life.'

The foregoing language was, in our opinion, *perfectly justified by the evidence.* We have said as much in another part of this opinion. We can conceive of no stronger evidence of 'an abandoned and malignant heart' than that which discloses the act of deliberately and recklessly discharging a gun into a crowd of people with a total disregard of the consequences thereof. But if it were to be said that the language was wholly unwarranted by the record and imported into the case matters wholly foreign to the issues, it is to be remarked that the defendant is hardly in a position justly to complain of any damage which might have followed therefrom, since it does not appear in the record that he objected to the remarks complained of when made or called the attention of the court thereto at the time, so that they could have been ordered stricken out and the jury instructed not to pay heed to them. Over and over again, the appellate courts of this state have held that objectionable remarks by the district attorney in a criminal case will not be reviewed or considered unless they have been objected to at the time they were made so that the trial court may be accorded an opportunity to counteract, if it can thus be done, their effect upon the jury." (Cases cited.)

In *Valentine v. State,* 159 S. W. 26, decided by the Supreme Court of Arkansas, July, 1913, at page 28 the court said:

"We have examined the objections made to the remarks of the prosecuting attorney in his closing argument to the jury, and it is unnecessary to set them out in the opinion. It is sufficient to say of these that they were

but the *expressions of the opinion of counsel on behalf of the state that the appellant, under the circumstances shown in evidence, was guilty of the highest crime known to the law, and that it was the duty of the jury to so find by their verdict. These remarks were clearly within the bounds of legitimate argument.* Leonard v. State, 152 S. W. 590; Williams v. State, 100 Ark. 218, 139 S. W. 1119; James v. State, 94 Ark. 514, 127 S. W. 733."

EVERY STATEMENT OR SUGGESTION MADE BY EITHER OF THE GOVERNMENT COUNSEL AS TO THE FACTS BEFORE THE JURY, THE GUILT OF THE DEFENDANT, THE SANCTITY OF THE HOME, THE IMPORTANCE OF THE CASE UNDER CONSIDERATION, WAS FULLY WARRANTED BY THE RECORD DIRECTLY OR INFERENTIALLY OR WAS A LEGITIMATE SUBJECT FOR COMMENT OR SUGGESTION BY COUNSEL IN THE PROPER PRESENTATION OF THE CASE TO THE JURY.

The case of alleged misconduct of counsel presented by plaintiff in error is absolutely without merit. No statement of counsel as to the facts is without abundant warrant in the record. Many of the cases cited above, especially the California cases, fully justify language even stronger than that used by counsel for the Government in the case at bar. As said by the New York Court of Appeals in the Conklin case:

> "The prosecuting officer has the right to try his case in the same way and subject to the same rules as other counsel."

There is nothing in the position of a public prosecutor that requires that he should be muzzled when

it becomes his duty to present the facts of an important case for the consideration of the jury. It is not only his privilege, it is his duty to present those facts as he sees them, for the proper consideration of the twelve men chosen for the time being to sit as judges and pass upon the facts.

As further said by the New York Court of Appeals:

> "It is only when he resorts to violent denunciations and to matters not embraced in the proofs, or involved in the issue that the court may interfere."

We have in the preceding pages shown that every utterance of counsel made in the argument, was directly warranted by the record, and was a statement of a fact absolutely shown therein or an inference from such fact which might naturally and properly be deduced therefrom. The plaintiff in error relies especially on the case of

People v. Hail, 19 Cal. App. Dec. 298.

The facts of that case are as widely dissimilar to the facts of the case at bar as it is possible to be. Furthermore, in the *Hail* case, as said by the court, there was a "manifest paucity of evidence tending to establish the guilt of the defendant". In the case at bar there is an absolute plethora of evidence establishing beyond question the guilt of the accused. A portion of the language complained of in the *Hail* case is thus set out, at page 309:

"In the course of his argument to the jury, the district attorney said: 'Men have been acquitted who have committed cold-blooded murder, and if you were to acquit this man under the testimony here *you would be allowing a cold-blooded murderer with human gore yet dripping upon his hands to go unwhipt of justice; gentlemen, you cannot do it, you will not do it. Should you do it you would be afraid to go out on the street and meet your fellow-men.*'"

* * * * * *

Speaking of this violent language the court said:

"That the effect of the statement that the jurors, in the event that they acquitted the defendant, *would be afraid to go out upon the public streets and meet their fellow-men, was to intimidate or influence them to return a verdict of conviction, regardless of their views as to the effect of the evidence, cannot for a moment be doubted.* Whether the language referred to was used in good faith or for the purpose of influencing a verdict, is immaterial. The vice and damaging effect of the utterance upon the rights of the accused remained. *In a case where evidence of guilt was overwhelming or conclusive, we might justly say that the language was not prejudicial in its effect upon the legal rights of the defendant,* although the use of such language would in such case be none the less reprehensible. But this is, as we have shown, not such a case."

Even language of the character quoted by the court in the *Hail* case would not, in its judgment, be sufficient to warrant the setting aside or reversal of the judgment if the testimony in the

case were clear and satisfactory. In the case at bar the testimony, beyond question, must have satisfied any jury composed of sane men that the defendant at the bar was guilty of the offense charged against him, certainly so far as the first count of the indictment was concerned. It is evident that the jury in the *Caminetti* case were not swept off their feet or swerved from their ordinary judgment as men, by any impassioned or unwarranted statement of counsel, or suggestion of any consequences to attend them after their release from the jury box. No threat was conveyed or suggested in any language of counsel. Counsel did very appropriately call attention to the sanctity of the home. And why should they not? The sacredness of four homes was shattered, two homes of young girls were invaded, four households were broken up. Why then should not counsel representing the Government feel responsibility resting upon them to speak of the sanctity of the home. It was a subject well worthy of presentation to an American jury in considering a case of the character here involved.

This argument is reaching such proportions that we cannot discuss at length and in detail every case suggested by counsel as affording a basis for the argument presented by our adversaries on the score of the alleged misconduct of counsel for the Government. Many of the cases cited in support of their position, on page 213 of their brief, are cases

in which the judgments of the trial courts were affirmed. One of them (*Collins v. State,* 145 S. W.) is a case to which we have above called attention as supporting our position. We shall content ourselves by calling attention to a few cases in which language far more deserving of criticism than any language used by counsel in this Caminetti case, has been justified, and refused consideration as a basis for reversal of judgment of conviction.

Bowen v. State (Ark. Oct. 19, 1911), 140 S. W. 28.

At page 31 the court said:

> "The prosecuting attorney, in his closing argument, further stated: 'The automobiles of the town are attempting to control and monopolize the streets, and if they are not stopped they will run you and me who do not own them off of the streets. It is a pity that the defendant had not been indicted for murder in the second degree and convicted for it, and if it were possible at this late time to so convict him he would ask them to give him the limit for that offense.' And further: 'For the protection of your wives and your little children on the streets and highways, I appeal to you to stop this reckless driving of automobiles that you see from time to time on the streets by making an example of this defendant, by giving him the limit at hard labor in the penitentiary.' Objection was made to these remarks and exception to the ruling of the court in permitting them was duly saved.
>
> The argument of the prosecuting attorney, taken as a whole, was but an expression of his opinion to the effect that the evidence showed that the appellant was guilty, and a denuncia-

tion by him of the violation of the law in running automobiles in such a manner as to interfere with the rights of other people who are also entitled to use the streets. It was but an admonition to the jury to the effect that the law was being violated in the running of automobiles, that this particular instance was in violation of the law, and that it was their duty to punish such violations. It was an appeal to the jury to enforce the law in order to protect the rights of the people and the public in general. *The prime object of all criminal statutes is to prevent the commission of acts that will interfere with the personal rights of others, and the purpose in punishing those who have committed such offenses is to inflict personal pain and suffering only as an example to others who may be similarly inclined, in order to deter them from the commission of like offenses, and thus preserve the public welfare.*"

State v. Hilton (Mo. Sup. Ct. March, 1913), 154 S. W. 729.

In that case the court, in speaking of this subject of misconduct of counsel, said:

(733) "While it is true, as insisted by the defendant, that 'criminal cases should be determined by the evidence adduced and the law as defined in the instructions', *where the prevalence of a crime is shown and there is other ample evidence of defendant's guilt, an appeal by the prosecutor to the jury for a conviction on account of such prevalence is not unauthorized.* Such an appeal, couched in far more objectionable words than in the case at bar, was approved by this court in State v. Zumbunson, 86 Mo. 111."

McElroy v. State (Ark. 1913), 152 S. W. 1021.

The court there said:

> *"Prosecuting attorneys certainly have the right, in the name of and for the peace and welfare of society in general and of those who have been immediately and specifically injured by the commission of heinous crimes, to appeal to the jury to do their duty in the punishment thereof.* As was said by us in a recent case: 'The remarks of counsel do not, we believe, transcend the bounds of legitimate argument as marked out by many of the previous decisions of this court.' "

Williams v. Commonwealth (Ky. 1913), 156 S. W. 372.

In that case the court, in discussing a similar question, used this language:

> (375) "But it is insisted that the judgment should be reversed because of the improper argument of the commonwealth's attorney. The language complained of is as follows: *'At the beginning of this term of court there were nine murder cases on the docket. Now, gentlemen, this is a deplorable state of affairs, and it will never be stopped until we send some of them to the chair.'* The record further shows that counsel for appellant objected to the foregoing statement, and the court sustained the objection and withdrew the statement from the consideration of the jury."

Moore v. State (Tex. 1902) 70 S. W. 89.

In that case the following is shown in the opinion of the court:

> "Appellant also excepted to the action of the court permitting W. M. Imboden, representing

the state in the prosecution, to use in his argument the following language: 'If you do not hang this man, you ought to petition the legislature to exempt Sabine county from capital punishment, and then apologize to every good citizen of Sabine county for rendering any other verdict.' And again: 'This is the foulest murder ever committed in Sabine county. The juries of Sabine county have the reputation of never hanging anyone. Now, *this jury has a good chance to redeem that reputation, and they ought to do it by hanging this man.' We do not think it is a violation of the rules governing arguments by the prosecution to insist, where the evidence justifies it, on the infliction of capital punishment;* and if we recur to the statement of facts, which we are authorized to do, there is ample testimony which authorizes the state to insist on the infliction of capital punishment. It does not occur to us that the language here used was of a denunciatory character, but was *merely an indication to the jury that they should discharge their duty.* At any rate, there was no requested charge on the part of appellant's counsel to have the court instruct the jury to disregard said argument; and in the absence of such request and refusal by the judge, and bill of exceptions reserved thereto, the language here used is not of that character authorizing a reversal."

Pearl v. State, 63 S. W. 1013.

At page 1017 the Court of Criminal Appeals of Texas said:

"In his second bill of exceptions he complains of the following remarks of the state's counsel: *'Return a verdict in this case that will be approved by the good citizens of Brown County.'*

The judge, in approving the bill, states that appellant excepted to the remark above quoted, and that he immediately instructed the counsel to keep within the record; that there was no request that he instruct the jury to disregard the same. We do not think the remark was calculated to injure appellant; and, furthermore, no special charge being tendered the court to instruct the jury to disregard the testimony, he cannot now be heard to complain."

Blalock v. State (Ala. 1913), 63 So. 26.

In discussing alleged misconduct of counsel, at page 27, the Supreme Court of Alabama said:

"The excerpt from the argument of the solicitor set out in the bill of exceptions, to which objection was offered, and to exclude which a motion was made, cannot be taken to mean more, when construed in connection with the evidence, than that it was the duty of the jury to convict the defendant, if the evidence was sufficient, for the purpose of deterring others from committing similar offenses. This is one of the objects sought to be obtained by the enforcement of the criminal laws and punishment of offenders against it. *At most it could be deemed no more than an argument, intended to illustrate the evil consequences that might result from the failure of a jury to do their duty in the premises if the evidence was sufficient to authorize a conviction.* It does not appear from the isolated excerpt set out that the solicitor was asserting any fact, and it is not error to refuse to exclude the argument of counsel, although not strictly pertinent, when no fact is asserted, but simply an inference is drawn and argument made thereon."

Shows v. State (Mississippi, 1913), 60 So. 726.

In that case the district attorney, in the course of his argument to the jury, said:

> "If you don't convict this defendant on this testimony, you might as well tear the roof off the court house and throw the law books away."

In disposing of the alleged misconduct of counsel relied upon by the appellant in that case, the court said:

> (727) "We find no reversible error in the remarks made by the district attorney. It appears that the appellant was properly tried and convicted."

Johnson v. State, 50 S. W. 343.

In that case, the Court of Criminal Appeals of Texas, thus disposed of a question of this character:

> (344) "Appellant's first assignment of error in his motion for new trial is that the court erred in permitting the district attorney, in his closing argument to the jury, to use the following language: 'Gentlemen of the jury, we often hear the people say that they look to the juries for protection. *You cannot stand guard over your pure and innocent daughters, whom you so dearly love; but the people look to the jury to protect them against the crimes of rape, murder, and other crimes committed by such creatures as the defendant.*' The bill of exceptions upon which this assignment is predicated contains this qualification by the trial judge, to wit: 'The foregoing bill of exceptions is allowed and approved, with the following modification: In the remarks excepted to, there was

> no reference made in any manner to the defendant, but they consisted merely of a statement to the effect that the people looked to the juries for protection against all crimes, from murder and rape to theft.' With this qualification, we fail to see how the rights of appellant in the premises have been prejudiced or injured."

Authorities such as we have cited in the preceding pages of this subdivision of our argument might be multiplied indefinitely. At the expense of seeming tiresome, we have cited more than were really necessary. While as upon all subjects open to judicial discussion, there may be divergence of opinion as to the dividing line between proper argument by prosecuting officers and that which may justly be regarded as misconduct, no case cited by adverse counsel, nor any case which has come under our own observation, warrants the claim that either of the Government counsel in the case at bar exceeded the limits of proper argument in presenting the case to the jury. The statements as to matters of fact were directly grounded on testimony contained in the record, or they were inferences naturally and logically deducible from such testimony. Counsel were justified in their denunciation of the proven conduct of defendant. They were justified in characterizing that conduct as violation of the sanctity of homes. They were justified in their claim that defendant was clearly guilty of the offense charged. They were justified in calling upon the jury to do their sworn duty and to vindicate the outraged majesty of the law.

VIII.

THE TRIAL COURT COMMITTED NO ERROR IN REFUSING THE SEVERAL INSTRUCTIONS REQUESTED BY THE DEFENDANT, NUMBERED 99, 100, 107, 109, 111 AND 114, ADVISING THE JURY THAT THE MERE PRESENCE OF CAMINETTI WITHOUT ANY ACT OF PARTICIPATION ON HIS PART, CONSTITUTED NO OFFENSE.

At pages 249 to 260 of their brief counsel for plaintiff in error argue the proposition stated in this language:

> "The trial court erred in refusing to give the several instructions requested on behalf of the defendant, advising the jury that mere presence by the defendant Caminetti without any act of participation on his part did not constitute the commission of any offense so far as he was concerned."

The several instructions referred to are set out at pages 249 to 254. The testimony called to the attention of the court in the preceding subdivisions of this argument shows vastly more than Caminetti's *"mere presence"* at the time of the commission of the offense as charged and proven against Maury I. Diggs and himself. Caminetti was not a mere spectator; he was an actual and active and very energetic participant therein. He was forceful in argument and resourceful in funds. He suggested that Diggs be made the boss or manager of the party and that Diggs alone, instead of any other of the party should actually purchase the tickets, while he, Caminetti, "stood around" with the girls in the shadow of the station building so that the party

might not be observed while the tickets were being secured for their transportation. The facts assumed in the instructions referred to were without foundation in the testimony. Nothing in the testimony tended to show that Caminetti was a party to the action only by reason of his "mere presence" or his mere knowledge of what was being done by Diggs. The testimony given by the girls established the direct contrary and no word of denial or explanation escaped Caminetti during the trial. Assumption of the mere presence and knowledge by Caminetti without participation, certainly had no foundation in any fact established by the record. The testimony as to Caminetti's connection with the actual transportation of the girls is so fully set forth in the preceding pages that we make no further reference to it at this point.

IX.

THE TRIAL COURT COMMITTED NO ERROR IN REFUSING DEFENDANT'S REQUESTED INSTRUCTION NO. 116.

At pages 261-263 of their brief, counsel argue the proposition thus stated:

> "The trial court erred in refusing to give instruction No. 116 requested on behalf of defendant."

A part of the instruction was in this language:

> "It must further appear to your satisfaction beyond reasonable doubt that the $20 or some portion thereof was actually used by Lola

> Norris or Marsha Warrington to purchase a railroad ticket to Reno as charged in the indictment. If it does not so appear to your satisfaction and beyond a reasonable doubt, it will be your duty not to consider the mere giving of the $20 by the defendant. * * * to Miss Norris for the purpose of purchasing her ticket and that of Miss Warrington, as any offense within the meaning of the White Slave Traffic Act."

The instruction as requested would certainly have been misleading. It certainly was not essential in order to make out a case against the defendant for aiding in the transportation, to show that the $20 given by him to Lola Norris had been actually expended either in the purchase of a ticket for herself or for one for Marsha Warrington, or tickets for both. The offense as against Caminetti might well be established by the testimony, if all the evidence on the subject of the $20 was actually eliminated from the record. The giving of the $20 to Lola Norris shortly before train time was not the only or the main evidence relied upon by the prosecution to establish Caminetti's complicity in the transportation of the girls to Reno. His co-operation with Diggs in the arrangement of the details of the trip have been sufficiently set our in the preceding pages to render it unnecessary that we should here repeat the testimony of the several witnesses. In any event the giving of the $20 by Caminetti to Lola Norris was a circumstance to be considered in connection with the other evidence in the case in order to enable the jury to determine whether or not Cami-

netti aided or abetted Diggs in the actual purchase of the tickets and in the transportation of the girls.

X.

THE COURT COMMITTED NO ERROR IN REFUSING INSTRUCTION NO. 31 REQUESTED BY DEFENDANT.

At pages 264 to 266 defendant argued that error was committed by the trial court in refusing an instruction requested, in this language:

> "In considering the testimony of the witness, Lola Norris, and determining the credibility to be attached thereto and the weight to be given her evidence, you may consider her motive in testifying, whether or not she has been or appears to be acting under the influence of any person or persons, whether or not any promise of immunity has been promised to her, and any hopes she may have for leniency in any criminal action brought against her.

Counsel justify their claim of error on the part of the trial court by certain testimony set out on pages 264-266. An examination of that testimony and of all of the testimony in the record bearing on the same question, discloses no reason for the giving of an instruction by the court in the language quoted.

The record shows no promise of immunity or any offer of leniency by the Government as a consideration to the witness Lola Norris for testifying to the facts in connection with the Reno trip. Beyond all question the facts, conditions and circumstances

of that trip were as detailed by her. Certainly Caminetti did not contradict her.

XI.

THE TRIAL COURT COMMITTED NO ERROR IN REFUSING REQUESTED INSTRUCTION NO. 13 (REC. 447) OR INSTRUCTION NO. 79 (REC. 458).

At page 267 of their brief counsel argue that the trial court committed error in refusing each of the instructions referred to.

Requested Instruction No. 13 referred to the matter of circumstances of suspicion as being insufficient and to the necessity of establishing guilt beyond a reasonable doubt.

On the subject of reasonable doubt and the evidence required for a conviction, the trial judge in his charge used this language:

> "The burden of proof in this case, as in all other criminal prosecutions, is upon the Government, and it is not necessary for a defendant to offer evidence in disproof of any allegation of the indictment until the facts proven, if unrefuted by him, are sufficient to establish his guilt. The law, in its charity, presumes the innocence of a defendant, and that presumption abides with him throughout the trial and until his guilt is established by the evidence. Before a conviction may be had it is incumbent upon the Government to prove the guilt of a defendant by evidence which, as I have heretofore stated, satisfies the minds of the jury beyond a reasonable doubt, and that means by evidence which satisfies their minds to a

moral certainty, and which accords with their reason and judgment to an extent which would induce them to act in the important affairs of life. As a great jurist has well expressed it, a reasonable doubt arises when the jury, after a fair and impartial consideration of all the evidence in the case, are unable to say that they feel an abiding conviction to a moral certainty of the truth of the charge; a certainty which satisfies the reason and directs the understanding of those who are bound to act conscientiously upon it. If, therefore, after a full consideration of the evidence presented, the jury are conscientiously able to say that they entertain such a doubt as to the guilt of the defendant under any count of this indictment, they must resolve that doubt in his favor by an acquittal as to such count; and of course if you entertain such doubt as to all the counts, then you should acquit him on all. This applies to the jury as a whole and to each member of it, since in a criminal case the verdict must be unanimous; and this degree of proof must obtain as to each independent fact or circumstance relied upon to show guilt; that is, each essential fact or circumstance in a chain necessary to establish guilt must be sustained to the same degree of certainty, since a chain is truly said to be no stronger than its weakest link.

And where circumstantial evidence is relied upon in whole or in part for a conviction, such circumstances should not only be in harmony with the guilt of the accused, but they must be such that they cannot reasonably be true in the ordinary course of things and the defendant be innocent."

The case before the jury being a criminal case and the rule governing such cases being fully and fairly stated and with extreme regard to the rights

of the defendant, there was no occasion for confusing the jury by stating to them what the rule might be in a civil case—one not before them.

XII.

THE TRIAL COURT COMMITTED NO ERROR IN REFUSING REQUESTED INSTRUCTIONS NUMBERED 22 AND 23 (REC. 448) AND 24 (REC. 449).

At pages 268 to 271 counsel for plaintiff in error argue that the trial court committed prejudicial error in refusing the several instructions above indicated. The several instructions related to the subject of circumstantial evidence. In so far as the matter embraced in them was proper for the guidance of the jury, the law was correctly given to the jury in the portion of the charge quoted by us in the next preceding subdivision of this argument.

XIII.

THE COURT COMMITTED NO ERROR IN REFUSING DEFENDANT'S REQUESTED INSTRUCTION NO. 115 (REC. 468), OR INSTRUCTION NO. 96 (REC. 460).

Counsel argue on pages 272-278 that the trial court erred in the refusal of the instructions above indicated. The contention is without merit. Both instructions refer to the question of specific intent on the part of the defendant in connection with the transportation from Sacramento to Reno. With

reference to the subject of specific intent the trial court used this language:

> "You will observe that in each count of the indictment the specific purpose and intent of the defendant in committing the particular criminal act therein charged is alleged. The existence of this intent at the time of committing any of the acts charged is made essential under the statute to constitute an offense, that is, that the act be committed to accomplish the immoral purpose denounced, since there must exist a union of act and intent. It is therefore essential to the guilt of the defendant under any one of these counts that you find the existence of this intent at the initiation of any such act. That is one of the substantive elements necessary to constitute a violation of the law in question. The intent need not, however, be formed for any fixed period of time before the act is committed. It is sufficient if it coexists with the commission of the act."

Testimony showing the facts and circumstances and the conduct of the defendant from which the jury might find the specific intent has been so fully set out in the preceding pages that we forbear any reference to the same at this point.

XIV.

THE TRIAL COURT COMMITTED NO ERROR IN REFUSING THE SEVERAL INSTRUCTIONS SET OUT IN SUBDIVISION XIII OF THEIR ARGUMENT AT PAGES 279 TO 297.

At the pages indicated counsel discuss the proposition thus stated:

> "The trial court erred in refusing to give at least some of the several instructions requested

on behalf of the defendant relating to the question of the specific intent denounced 'by the White-Slave Traffic Act'."

At page 279 counsel say:

"We state frankly that we did not expect the trial court to give all of the instructions requested on the subject of the intent and purpose of the defendant."

The matter of the specific intent was so fully and carefully covered by the trial judge in his charge and the facts from which the specific intent might be found by the jury have been so fully set out in the preceding pages that we forbear any discussion of the matter set out by counsel for plaintiff in error in Subdivision XIII of their argument at pages 279 to 297.

XV.

THE TRIAL COURT DID NOT OVERLOOK THE ONLY ISSUE INVOLVED IN THE CASE PRESENTED TO THE JURY FOR THEIR CONSIDERATION.

At pages 298 to 314 counsel discuss the proposition stated in this language in Subdivision XIV of their brief:

"The only issue involved in the indictment escaped the attention of the trial court. This issue was also the only issue in the evidence. The whole charge of the trial court to the jury was for this reason misleading and erroneous and the jury was blinded as to the real issue. By reason of this, therefore, defendant failed to receive a fair and impartial trial."

The argument contained in this subdivision of the brief of counsel for plaintiff in error might probably be left to fall of its own weight. However, so much importance is attached to it by adverse counsel that we call attention to the record for the purpose of showing how absolutely without foundation is the position taken by plaintiff in error.

The first count of the indictment on which the defendant was found guilty is shown on page 2 of the record. It charges that

> "F. Drew Caminetti, * * * at Sacramento, in the State and Northern District of California, then and there being, did then and there willfully, knowingly and feloniously, unlawfully transport and cause to be transported and aid and assist in obtaining transportation for and in transporting in interstate commerce from Sacramento * * * to Reno, in the State of Nevada, over the line of railroad of the Southern Pacific Company, a certain girl, to wit, *one Lola Norris, for the purpose of debauchery and for an immoral purpose, to wit, that the aforesaid Lola Norris should be and become the concubine and mistress of the said defendant.*"

In the initial portion of the charge the trial judge called attention to the provisions of the White Slave Traffic Act and the several offenses therein and thereby denounced (Rec. 425-429). This portion of the charge is also set out in pp. 23-29 of this brief).

> "That act, so far as here involved, provides in substance, that any person who shall knowingly transport or cause to be transported or aid or assist in obtaining transportation for, or in transporting in interstate commerce, any

> woman or girl for the purpose of prostitution or debauchery, or for any other immoral purpose or with the intent and purpose to induce, entice or compel such woman or girl to become a prostitute or to give herself up to debauchery or to engage in any other immoral purpose * * * shall be deemed guilty of felony."

On page 27 of this brief the following language of the charge is shown:

> "The indictment in this case is framed in four separate counts, which you will find to cover and include the several acts denounced in the statute, as I have outlined it above, and charges the acts of the defendant as having relation to two different women or girls with reference to whom it is charged the statute has been violated by such acts * * * In the first count of the indictment it is charged that * * * at Sacramento, in this State, the defendant wilfully, knowingly and feloniously, unlawfully transported and caused to be transported and aided and assisted in obtaining transportation for and in transporting in interstate commerce from the City of Sacramento to Reno, in the State of Nevada, over the line of railroad of the Southern Pacific Company, *one Lola Norris for the purpose of debauchery and for an immoral purpose, to wit: that said Lola Norris should be and become the concubine and mistress of the defendant.*"

At pages 28 and 29 of this brief the following portion of the charge is shown:

> "The terms concubine and mistress as implied in the counts of the indictment just read to you mean, for the purpose of this case, a woman or girl who cohabits with a man without being his wife; a paramour; that is one who lives with a man and has sexual relations

with him without being his wife; and to constitute which relationship it is not necessary that such cohabitation or living together shall continue during any fixed or definite period of time.

"The term debauchery as used in the statute and alleged in the indictment may be best understood by first ascertaining the meaning of the verb. To debauch is to lead away from purity; to corrupt in character or morals; to pollute; to seduce from paths of virtue; a man debauches a woman when by insidious approach; by kind attention, rides, drives, theaters, gentle compliments, protestations of affection accompanied by caresses or like methods, he first gains her confidence and love, and then, by taking her to questionable resorts, plying her with intoxicating drinks, or other similar means, he breaks down her sense of delicacy, perverts her moral nature, and arouses her animal passions, and then seduces her to lewd actions such as illicit sexual relations or intercourse. When this result is accomplished it constitutes debauchery within the meaning of this statute.

And in this connection I instruct you that the purpose for which it is charged in this indictment the transportation of each of these girls was made, constitutes debauchery and immoral purpose within the meaning of the statute in question."

The definitions of debauch and debauchery as given in the charge are in accord with the definitions of the same words as found in Webster's International Dictionary, as are the other words defined by the trial judge in his charge.

Bouvier's Law Dictionary thus defines concubine:

> "A woman who cohabits with a man as his wife without being married."

The same term is thus defined in Webster's Dictionary:

> "A woman who cohabits with a man without being his wife; a kept mistress; a woman who lives in concubinage with a man."

"Concubinage" is thus defined:

> "Cohabiting of a man and woman who are not legally married; the state of being a concubine."

"Cohabit" is thus defined by the same author:

> "(1) To cohabit or live in company or in the same place; (2) to dwell or live together as husband and wife."

The word "mistress" is thus defined by the same author:

> (8) A woman with whom a man habitually consorts unlawfully or who occupies, wholly or partly, the position of wife to a man without being married to him; a woman living with or supported by a man as his paramour."

Definitions given by the trial judge are clearly in line with recognized definitions of the words and with the meaning of the words as popularly understood.

The uncontradicted testimony of the two girls clearly shows that the relations maintained between Caminetti and Lola Norris were those of mistress

or concubine. They certainly were cohabitating in the Reno bungalow in the manner of husband and wife. The conduct of the parties was clearly immoral and of the specific character referred to in the indictment and in the charge of the trial judge. That acts of this kind are covered by and denounced by the White Slave Traffic Act is a matter discussed by us in Subdivision III of our brief (pp. 44-73).

At pages 59 to 66 of this brief we call attention to the case of *United States v. Bitty,* reported first in 155 Fed. 938, and in the Supreme Court in 208 U. S. 393-403; 52 Law Ed. 543-547.

The lower court in that case had taken the view so stoutly maintained by the adverse counsel in the case at bar. The prosecution there was not under the White Slave Traffic Act, but under the Immigration Law. The woman there had been brought into the United States to become the concubine and mistress of the defendant.

At page 66 of our brief we quote the language of Mr. Justice Harlan, shown at 208 U. S. 403; 52 Law Ed. 547, as follows:

> "We must hold that Congress intended by the words 'or for any other immoral purpose' to include the case of any one who imported into the United States an alien woman that she might live with him as his concubine. The statute in question, it must be remembered, was intended to keep out of this country immigrants whose permanent residence here would not be desirable, or for the common good, and we cannot suppose either that Congress intended to exempt from the operation of the statute the

> importation of an alien woman, brought here that she might live in a state of concubinage with the man importing her, or that it did not regard such an importation as being for an immoral purpose."

The court there reversed the judgment of the lower court.

At pages 66-72 of this brief we called attention to the case of *John Arthur Johnson v. United States of America,* determined by the United States Circuit Court of Appeals for the Seventh Circuit at the January session of 1914. That case follows the reasoning of the Bitty case. At pages 71 and 72 we called attention to the decision by District Judge Foster of the Eastern District of Louisiana, in *United States v. Flasboller,* 205 Fed. 1007. The following language was used by the judge in that case:

> "The indictment sets out that the woman was persuaded to go from one state to another for the purpose of engaging in illicit intercourse, cohabitation and concubinage with the accused. Certainly illicit cohabitation and concubinage are immoral acts analogous with prostitution, and come well within the letter of the statute. * * * In my opinion the case is on all fours with that of the United States v. Bitty, 208 U. S. 293, and interpretation of the statute must be controlled by that decision."

Counsel for plaintiff in error claim to find some comfort in the case of

Suslak v. United States, 213 U. S. 913.

The case, in fact, lays down no doctrine at variance with the contention made by counsel for the Government in the case at bar.

The language quoted by counsel in their brief at page 207 merely goes to the point that the word "cohabit" as used in the indictment in that case was not properly defined by the trial judge in the charge to the jury, the appellate court holding that where the pleader in the indictment used the term "cohabit" the meaning attached to that term should be such as is ordinarily given to it as a legal phrase. No such question is presented in the case at bar. The word "cohabit" is not found in the indictment here before the court.

In the Suslak case there were twelve counts in the indictment. In the first count it was charged that the defendant transported the woman for the purpose of prostitution; in the second count unlawful cohabitation was designated as the purpose; in the third count debauchery; in the fourth an intent to induce plaintiff to become a prostitute; in the fifth the intent to induce her to give herself up to debauchery.

It was in discussing the use of the word "cohabitation" in the indictment that the Circuit Court of Appeals made the criticism of the charge. Of course no such question is presented in the case at bar. The term "concubine", as we have seen, involves a cohabiting or living together between people who are not married one to the other.

The definitions of terms as given by the trial judge in the case at bar are warranted by all the lexicographers. There is no question here of the pleader using the term "cohabit" and improperly

defining such term as used in the indictment. There is absolutely no merit in the position taken by counsel at pages 209 to 314 of their argument, in which this question is discussed.

XVI.

THE COURT DID NOT ERR IN REFUSING DEFENDANT'S REQUESTED INSTRUCTION NO. 36 (REC. 451), OR REQUESTED INSTRUCTION NO. 17 (REC. 469-470), OR REQUESTED INSTRUCTION NO. 118 (REC. 470-471), NOR WAS ERROR COMMITTED BY THE TRIAL COURT IN PERMITTING THE WITNESS, W. E. DOAN, TO TESTIFY TO STATEMENTS MADE BY THE DEFENDANT AND BY LOLA NORRIS WHILE ON THE TRAIN RETURNING TO SACRAMENTO.

At pages 315-317 counsel for plaintiff in error discuss the proposition thus stated:

> "The trial court erred in refusing to give the following instructions requested on behalf of the defendant,"

reciting at pages 315 and 316 the instructions on the subject of alleged confessions and admissions by the accused and advising the jury that such testimony should be received with great caution.

At pages 329 to 345 counsel discuss the proposition thus stated:

> "The trial court erred in permitting the witness, W. E. Doan, official shorthand reporter of the Superior Court of Sacramento, to testify to certain admissions made by the defendant and by Lola Norris."

Both subdivisions of the brief, XV and XXI, relate to practically the same question and the main argument is directed at the action of the trial court in admitting the testimony of the shorthand reporter as to self-disserving statements made by the defendant Caminetti and declarations made by Lola Norris in his presence on the train upon which the parties returned from Reno to Sacramento.

The general rule on the subject of admissions and disserving declarations is thus stated in *2 Am. & Eng. Enc. of Law and Practice:*

> "The most common exception to the general rule excluding declarations as hearsay evidence is to be found in the admissibility of admissions or declarations against interest made by a party to a cause. The character of this exception is self-evident, for it is reasonable to assume that no person of sound mind will make a concession against his interest unless it be founded in absolute truth. There is no material distinction so far as legal effect is concerned between an admission, which is the conceding of the truth of a statement made by another, and the disserving declaration, which is a statement made by the party against whom it operates, except in the weight to be given it as evidence. The former is weaker, because it involves the proof of the statement made, together with all the facts and circumstances tending to show that its truth was admitted; while the latter may afford evidence of the highest character, proof of the declaration alone being necessary. *As a general rule the admissions or disserving declarations of a party to the record whenever, wherever, however, or to whomsoever made, are receivable against him both in civil and in criminal cases.*"

Among the cases cited to sustain the doctrine is *Hardy v. United States,* 186 U. S. 224-230; 46 Law Ed. 1137-1140.

In that case the accused had voluntarily made statements before and after his preliminary examination. On the trial these statements were offered in evidence against him. One of the grounds relied on for the reversal of the judgment was that the court had committed error in allowing the introduction in evidence of these statements. Speaking of this question, Mr. Justice Brewer said:

> "Finally, it is insisted that the court erred in permitting the government to introduce in evidence a statement made by the defendant to one R. H. Whipple, United States commissioner, before whom the preliminary examination was had—a statement reduced to writing and signed by the defendant. Sections 307 to 311 inclusive of chap. 429 (30 Stat. at L. 1319) are relied upon to sustain this assignment of error. Those sections provide that on a preliminary examination, after the government's witnesses have been examined, the magistrate must inform the defendant that it is his right to make a statement in relation to the charge against him, that the statement is designed to enable him, if he sees fit, to answer the charge and explain the facts alleged against him, that he is at liberty to waive making a statement, and that such waiver cannot be used against him on the trial; they further provide that if he does waive his right to make a statement a memorandum thereof shall be made by the magistrate, but the fact of the waiver cannot be used at the trial; that if he chooses to make a statement the magistrate must take it in writing, propounding only certain specified ques-

tions; that his answer to each of the questions must be read as taken down, and he given liberty to make any corrections that he desires, and that such statement, so reduced to writing, must be authenticated in the following form: It must set forth that the defendant was informed of his rights in respect to making or waiving a statement; it need not contain the questions, but must contain the answers, with the corrections or additions made by the defendant, it may be signed by him, but if he refuses to sign his reason therefor must be stated, as he gives it; and the whole must be signed and certified by the magistrate. The magistrate testified that before the preliminary examination was commenced the defendant voluntarily and without any suggestion insisted upon making a statement. Whereupon he, the magistrate, informed him that he was entitled to counsel, that he was under no obligations and need not make any statement, but that if he did it would be used against him on the trial, and also that if he waited an opportunity would be given to him to make a statement at the proper time; that notwithstanding this he insisted on making a statement, and it was then reduced to writing by the clerk of the court and signed and sworn to by the defendant; that after the examination had commenced and the testimony of witnesses for the government had been taken the statutory questions were put to him, and he was advised that he could then make a statement if he desired, but he refused to say anything. Upon this showing the statement was admitted in evidence. The magistrate also testified that after the examination was over and the defendant had been placed in jail the latter sent word that he wanted to talk with him about the case, and in an interview stated orally that his former statement was untrue, and volunteered a different account of the transactions. There was no con-

tradiction of the testimony as to the circumstances under which these two statements—one written and the other oral—were made, except that in reference to the last statement defendant, when on the witness stand, testified that the magistrate 'came up to the jail and ordered me to return to his office for the purpose of securing some information to arrest some other fellows, or get some points of me of other parties'. From this testimony it clearly appears that *the statements were not made pending the examination or under the provisions of the statute, but voluntarily one before and the other after the examination;* that the provision of the statute as to giving him notice pending the examination was complied with, and that at that time he declined to make any statement. So the question is *whether voluntary statements made by a defendant, before and after a preliminary examination are inadmissible in evidence because made to the magistrate who in fact conducted the preliminary examination. We know of no rule of evidence which excludes such testimony.* Of course, statements which are obtained by coercion or threat or promise will be subject to objection. Bram v. United States, 168 U. S. 532, 42 L. ed. 568, 18 Sup. Ct. Rep. 183. But, so far from anything of that kind appearing, the defendant was cautioned that he was under no obligations to make a statement; that it would be used against him if he made one, and that there was a proper time for him to make one if he so desired. Without even a suggestion, he insisted on making, prior to the examination, a statement which was reduced to writnig and by him signed and sworn to, and after the examination was over and he had been placed in jail, he had an interview with the magistrate and volunteered a further statement. Affirmatively and fully it appears that all that he said in the matter was said voluntarily, without any inducement or

> influence of any kind being brought to bear upon him. Indeed, it is not claimed by counsel that there was any improper influence, his contention being only that the provisions of the statute with respect to a statement pending an examination were not complied with in respect to these statements. *The statements were properly admitted in evidence.*"

A case frequently cited, which justifies the admission in evidence of testimony showing admissions by an accused while under restraint or imprisonment is

> *Sparf v. United States,* 156 U. S. 51; 39 Law Ed. 343.

Mr. Justice Harlan there used this language:

> (344) "At the trial, Captain Sodergren, a witness for the government, was asked whether or not after the 13th day of January and before reaching Tahiti—which was more than one thousand miles from the locality of the alleged murder—he had any conversation with the defendant Hansen about the killing of Fitzgerald. This question having been answered by the witness in the affirmative, he was fully examined as to the circumstances under which the conversation was held. He said among other things that no one was present but Hansen and himself. Being asked to repeat the conversation referred to, the accused by the counsel who had been appointed by the court to represent them objected to the question as 'irrelevant, immaterial and incompetent, and upon the ground that any statement made by Hansen was not and could not be voluntary'. The objection was overruled, and the defendants duly excepted. The witness then stated what Hansen had said to him. The evidence tended strongly to show that Fitzgerald was

murdered pursuant to a plan formed between St. Clair, Sparf, and Hansen; that all three actively participated in the murder; and that the crime was committed under the most revolting circumstances.

Thomas Green and Edward Larsen, two of the crew of the Hesper, were also witnesses for the Government. They were permitted to state what Hansen said to them during the voyage from Tahiti to San Francisco. This evidence was also objected to as irrelevant, immaterial and incompetent, and upon the further ground that the statement the accused was represented to have made was not voluntary. But the objection was overruled and an exception taken.

* * * * * *

The declarations of Hansen, as detailed by Sodergren, Green and Larsen, were clearly admissible in evidence against him. There was no ground on which their exclusion could have been sustained.

* * * * * *

(345) So far as the record discloses, these confessions were entirely free and voluntary, uninfluenced by any hope of reward or fear of punishment. In Hopt v. Utah, 110 U. S. 574, 584 (28 Law ed. 262, 266), it was said: 'While some of the adjudged cases indicate distrust of confessions which are not judicial, it is certain as observed by Baron Parke, in Reg. v. Baldry, 2 Den. C. C. 430, 445, that the rule against their admissibility has been sometimes carried too far, and in its application justice and common sense have too frequently been sacrificed at the shrine of mercy. *A confession, if freely and voluntarily made, is evidence of the most satisfactory character. "Such a confession"*, said Eyre, C. B., 1 Leach, C. C. 263, *"is deserving of the highest credit, because it is presumed to flow from the strongest sense of guilt,*

*and, therefore, it is admitted as proof of the crime to which it refers.'' * * *'*

Counsel for the accused insist that there cannot be a voluntary statement, a free open confession, while a defendant is confined and in irons under an accusation of having committed a capital offense. We have not been referred to any authority in support of that position.

* * * * * *

Confinement or imprisonment is not in itself sufficient to justify the exclusion of a confession, if it appears to have been voluntary, and was not obtained by putting the prisoner in fear or by promises. * * * Nothing said to Hansen prior to the confession was at all calculated to put him in fear or to excite any hope of his escaping punishment by telling what he knew or witnessed or did in reference to the killing.

The declarations of Hansen after the killing, as detailed by Green and Larsen, were also admissible in evidence against Sparf, because they appear to have been made in his presence and under such circumstances as would warrant the inference that he would naturally have contradicted them if he did not assent to their truth.''

A later case ruling on the same point is

Perovich v. United States, 205 U. S. 86; 51 Law Ed. 722-724.

At pages 723 and 724 the following is found in the opinion of Mr. Justice Brewer:

"Again it is alleged that there was error in overruling a motion made by defendant to strike out all the testimony given by a deputy marshal of conversations between him and the defendant. *As these conversations were not in-*

duced by duress, intimidation or other improper influence, but were perfectly voluntary, there is no reason why they should not have been received."

DISTINCTION BETWEEN DISSERVING DECLARATIONS AND CONFESSIONS.

In the proposed instruction and in the argument claiming error in the admission of Caminetti's declarations made on the train, counsel for plaintiff in error deal with *disserving declarations* as if they were the same thing in law as *judicial confessions of guilt.* In this position they are manifestly in error.

In *2 Wharton's Crim. Ev.*, Sec. 622, pp. 1265-6 (10th Ed.), we find the definition of confession as follows:

> "A confession as applied in criminal law, is a statement by a person, made at any time afterwards, *that he committed or participated in the commission of a crime.* And such confessions are generally divided in two classes—*judicial confessions* and *extra judicial confessions.* Judicial confessions are those made by the accused in the court trying the crime charged and generally termed plea of guilt. *Extra judicial confessions are those made by any person outside of the sitting of the court."*

The next following section (622) dealing with confessions, as distinguished from admissions, uses this language:

> "An admission is distinguished from a confession by the fact that the term 'admission' in criminal matters relates to matters of fact that do not involve a criminal intent, and *a*

confession is an acknowledgment of guilt. The distinction between confessions and admissions must always be maintained, from the fact that *admissions are always admissible in evidence* under an exception to the rule excluding hearsay evidence, provided such admissions are made against interest, *while a confession must be affirmatively shown to have been made under conditions which would not induce a false statement.*"

The same subject is referred to in *2 Am. & Eng. Enc. of Law & Practice,* at pages 19-22. There, in speaking of admissions and declarations in criminal cases, the author says:

"There is a broad distinction between the *mere admission of inculpatory facts* and *a confession of guilt.* While confessions which are acknowledgments of guilt or declarations of agency or participation in crime are never receivable in evidence until there is satisfactory preliminary proof that they were voluntary, *evidence of admissions or disserving declarations, merely tending to establish guilt is always admissible,* whether they were made before or after commission of the crime, as where a murderer tells where may be found the body of his victim, the weapon used or property of the deceased, or where a thief gives information as to the location of stolen property. They are admissible when made while the accused is under arrest, although he is not informed of his rights or that his statements may be used against him, or the whole statement was not understood by the witness, and without precedent or proof that they were voluntary; and even where the other evidence shows that they were made involuntarily and under the influence of threats or promises or where induced by artifice or deception. This is not true of

> confessions, proof of which can only be had after they are clearly shown to have been made voluntarily and without any fear of punishment or hope of favor of reward. And admissions are not receivable as confessions or admissions of guilt but merely as sayings from which the jury may infer guilt. Hence, admissions are never competent to prove the *corpus delicti;* and in order to be admissible they must clearly relate to the specific crime charged, imply the declarant's guilt thereof and be pertinent to some issue involved in the trial."

This distinction between declarations and admissions and confessions and the differing rules governing the introduction in evidence of the one or the other class of testimony has been frequently pointed out and acted on by our California Supreme Court.

A case frequently cited is

People v. Strong, 30 Cal. 157.

There Mr. Chief Justice Currey, in speaking of "confessions" as distinguished from "admissions", uses the following language:

> (157) "At the request of the District Attorney, the court charged the jury in these words: 'You may give to the defendant's *admissions and confessions* such weight as you may deem them entitled to, judging from the circumstances under which they were given, and the motives which would naturally actuate the party giving them, and that you may, in your discretion, believe a part and disbelieve a part of such admissions and confessions.' To this the defendant's counsel excepted, and we think the exception well taken. From an examination of the evidence we have been unable

to discover anything therein which by any fair construction can be called a confession. The Attorney-General, who represents the people in this court, has not, though his attention has been called to it, undertaken to point out anything in the testimony of the witnesses even tending to prove a confession on the part of the defendant of any participation in the commission of the alleged homicide. *A confession, in criminal law, is the voluntary declaration made by a person who has committed a crime or misdemeanor, to another, of the agency or participation he had in the same.* (Bouvier's Dic. Confession.) *The word 'confessions' is not the mere equivalent of the words statements or declarations.* The defendant made statements to several of the witnesses, as they testified, respecting the departure of Holmes for San Francisco, and of their appointment to meet at that place, etc., but it is nowhere to be found in the testimony of the witnesses that he admitted or confessed to any participation in the homicide. In giving the instruction under consideration the court assumed that the defendant had made confessions. Even if the evidence had tended to prove that the defendant had in any degree admitted or confessed participation in the crime with which he stood charged, *it was for the jury to determine whether such evidence amounted to proof of the fact.* (People v. Levison, 16 Cal. 98; People v. Ah Fung, Ib. 137; People v. Carabin, 14 Cal. 438; People v. Williams, 17 Cal. 146.) In the same charge the jury were told that they might in their discretion believe a part and disbelieve a part of such admissions and confessions. We are not satisfied that this part of the charge would under any circumstances be entirely accurate and just, though it may be said to be warranted, if confessions had been made, by what the court said in The People v. Wyman, 15 Cal. 74. *The jury in the exercise of*

their discretion may determine what part of a narrative of the accused is to be believed, and what discredited, provided there are reasons for so doing."

This distinction between "admissions" and "confessions" is again recognized in the case of

People v. Parton, 49 Cal. 632.

In that case Mr. Justice McKinstry, speaking for the court, said:

(637-8) "The statement of the defendant to the witness, Sarah C. Kirby, did not constitute a 'confession', admissible only after proof that it was made voluntarily. *A confession is a person's declaration of his agency or participation in a crime. The term is restricted to acknowledgments of guilt.* (*People v. Strong,* 30 Cal. 157; 1 Greenleaf Ev. 170). An admission of a fact, not in itself involving criminal intent, is not to be rejected as evidence (without the preliminary proof) merely because it may, when connected with other facts, tend to establish guilt. The statement of the defendant objected to was, at most, an admission that he had taken improper liberties with the prosecutrix, or had with her consent attempted carnal intercourse with her. However immoral his conduct, his admission was not a confession of his guilt of the crime for which he was indicted, nor of any offense included in that crime."

2 Wharton's Crim. Ev., Sec. 631, p. 1310.

In discussing the general rule as to the admissibility of confessions, the author says:

"Subject to the qualifications we have just noticed, the rule is firmly established that a free and voluntary confession either of an offense as specifically charged or of the fact

from which such offense can be inferred, whether made before or after apprehension and whether in writing or not in written words or by signs, is admissible when offered against the accused no matter *where or to whom it was made.*"

Another case in which this same doctrine is recognized is

People v. Le Roy, 65 Cal. 613.

In that case Mr. Justice Ross, speaking for the California Supreme Court, said:

(614) "The point most relied on by counsel is that the court below erroneously admitted in evidence certain statements made by defendant to the witness Lees. It is claimed that those statements were not voluntarily made, but were extorted from defendant by means of threats and promises. It is true that defendant so testified at the trial, but the testimony on the part of the prosecution was to the effect that the statements were not induced by any threats or promises, but were made freely and voluntarily. However this may be, it is sufficient answer to the point to say that the statements made by defendant, concerning which the witness for the prosecution was permitted to testify, did not constitute a 'confession', admissible only after proof that it was made voluntarily. *A confession is a person's declaration of his agency or participation in a crime. The term is restricted to acknowledgments of guilt.* (People v. Parton, 49 Cal. 637; People v. Strong, 30 Cal. 157; 1 Greenl., Sec. 170.) The statements of defendant given in evidence were not acknowledgments of his guilt; on the contrary, in his statements he all the time denied his guilt. The matters admitted by him, however, while not in themselves in-

volving his guilt, did, when connected with other facts, tend to prove it. But proof of such admissions is competent. Said this court in People v. Parton, supra: 'An admission of a fact, not in itself involving criminal intent, is not to be rejected as evidence (without the preliminary proof) merely because it may, when connected with other facts, tend to establish guilt.''

Still another case on the same proposition is

People v. Miller, 122 Cal. 86-87.

In this case the court said:

"It is contended by defendant that the *corpus delicti* in this case was either that he was editor, proprietor, or publisher of 'The Illustrated World'; that there is no proof of the *corpus delicti* except the admissions of defendant; and that it cannot be established by extrajudicial admissions or statements. Counsel's position seems to be that a confession includes more than an admission, and that if by the former the *corpus delicti* cannot be established neither can it be by the latter. We cannot regard the editorship or proprietorship of the newspaper as the *corpus delicti* in this case. The essence of the crime is the malicious publication of the libelous language and does not necessarily lie in the authorship of the article or the ownership of the press that prints it. But even if these facts enter into the question of guilt it does not follow that an admission of ownership would be a confession of the crime. The acts and admissions of the defendant tending to show that he was the proprietor, either in himself or jointly with some other person, are not confessions in legal contemplation.

The law makes a wide distinction between confessions and admissions."

Caminetti's statements made in the presence of Atkinson, the Assistant District Attorney, were not in fact intended to be confessions on his part of his guilt under the White Slave Traffic Act or confessions of guilt under any charge then pending or threatened against him under state law.

They were not *in fact* intended by him, in any sense, as confessions of guilt. They were not *in law* admissions of guilt. They were not in any sense judicial declarations. They were not made in a judicial proceeding.

CAMINETTI'S STATEMENTS, WHILE IN NO SENSE CONFESSIONS, WERE ABSOLUTELY VOLUNTARY AND MADE AFTER FULL WARNING AS TO HIS STATUS AND HIS RIGHTS.

In the case at bar the self-disserving statements or admissions made by Caminetti were clearly voluntarily made. The witness Doan, at pages 335-6 of the record, thus testified:

> "This interview took place on the train. This train was between Truckee and Colfax. Before any statement was asked of the defendant at that time, Mr. Atkinson, the Assistant District Attorney, *informed him of his rights in the matter and that he need not answer unless he so desired.*"

The Assistant District Attorney told Caminetti of his official position and informed him further as follows:

> (336) "The officers have warrants for you as you probably know—warrants for your arrest. You have been charged or will be charged

with possibly two offenses: one, with contributing to the dependency of Miss Norris, a girl under twenty-one years of age, and of living in a state of adultery and cohabitation with her, you being married to some one else, and also a felony charge of deserting and abandoning your children.

* * * * * *

You are not obligated to make any statement about the matter. Anything you say must be said freely and voluntarily and with the knowledge on your part that anything you say can and will be used against you in the event that judicial proceedings are taken against you on these charges or any of them. You understand that, do you? A. *Yes, sir.*"

Under the circumstances detailed and the advice given by Atkinson to Caminetti, the testimony was clearly admissible.

At pages 334 to 337 of their brief, counsel argue that the declarations or conduct of Caminetti made while under arrest and in a different proceeding than that in which the declarations or admissions were offered in evidence, was not competent evidence, and should not have been admitted. No authority is cited to sustain the argument there made by counsel for plaintiff in error. In view of the manifest evidence of their very great industry, we must assume that their lack of citation of authority was due to the fact that no such authority could be found.

As we have shown above, self-disserving statements or declarations not amounting to judicial confessions of guilt are admissible in evidence even

in cases where involuntarily made. Their weight, whether voluntary or involuntary, must be determined by the jury. As said by Chief Justice Currey in *People v. Strong*:

> "Even if the evidence had tended to prove that the defendant had in any degree admitted or confessed participation in the crime of which he stood charged, *it was for the jury to determine whether such evidence amounted to proof of the fact. * * * The jury, in the exercise of their discretion, may determine what part of a narrative of the accused is to be believed and what discredited, provided there are reasons for so doing.*"

In what precedes, if our effort has not been in vain, we have shown that whether voluntary or not the evidence of Caminetti's statements made to Atkinson on the train was properly admitted in evidence. Under the law, even if involuntary—not being confessions—they were competent and admissible in evidence. The language of the witness Doan above quoted from the record shows beyond all question that the statements made by Caminetti were *voluntarily made by him after being fully warned of his position and of his rights.* In any event, Caminetti did not make those statements as a confession of guilt, either under the White Slave Traffic Act or under any proceeding pending in the State court. *In fact,* Caminetti did not intend his statements to be a confession of guilt. *In law* the statements did not constitute a judicial confession of guilt.

DISTINCTION BETWEEN JUDICIAL AND EXTRAJUDICIAL DECLARATIONS OR ADMISSIONS.

Lacking better support for the impossible position assumed by them on this question, counsel for plaintiff in error have called to their aid Sec. 1324 of the Penal Code of California. That statute avails them nothing. On its face the section deals only with *witnesses* who have made judicial as distinguished from extrajudicial utterances. The title of the statute (Stats. 1911, p. 482) is in this language:

> "An act to add a new section to the Penal Code to be numbered Section 1324, relating to *the testimony of witness refusing to answer* on the ground that such answer will incriminate him."

In its title and in its body and substance the statute deals only with *witnesses.* Who are witnesses as that term is understood in the several codes of the State of California? Section 1878 of the Code of Civil Procedure thus defines "witness":

> "A witness is a person whose *declaration under oath* is received as evidence for any purpose, whether such declaration be made on oral examination or by deposition or affidavit."

Caminetti was not under oath. His examination was not in a judicial proceeding. His statements were not made under oath on oral examination or by deposition or by affidavit.

At this point we desire to recall the court's attention to the language of Mr. Justice Brewer in the *Hardy* case (supra), when speaking of the

extrajudicial statements made by a prisoner before the very official who between the several statements of the prisoner, had conducted the official preliminary examination of the accused.

After speaking of the circumstances under which the several statements other than the official statements were made, the justice said:

> "From this testimony it clearly appears that the statements were not made pending the examination or under the provisions of the statute, but voluntarily, one before and the other after, the examination; * * * so the question is whether voluntary statements made by a defendant before and after a preliminary examination are inadmissible in evidence because made to the magistrate who in fact conducted the preliminary examination. *We know of no rule of evidence which excludes such testimony.*"

We again ask attention to the language of *Wharton's Criminal Evidence,* p. 1266:

> "Judicial confessions are those made by the accused *in the court trying the crime charged,* generally termed plea of guilt. Extrajudicial confessions are those made by any person *outside of the sitting of the court.*"

The Penal Code section relied upon by counsel deals with a *witness* who has

> "offended against any of the provisions of this code, or against any law of this State."

The section does not purport to deal with an accused who, away from the witness stand, or from any authorized legal proceeding, sees fit to make

disserving statements which subsequently may be grouped with other matters in effecting a proper condition of the testimony to afford the jury a ground for an inference of guilt or of guilty intent. If, instead of making his statements voluntarily before Atkinson, he had made the same statements before John Smith or Thomas Jones, either Smith or Jones might have been placed on the stand to prove them.

Sec. 1324 would not preclude the testimony of either Smith or Jones.

Caminetti did not demand that he be excused from testifying before Atkinson. He neither testified nor was he requested to testify before Atkinson. He was neither sworn nor asked to be sworn. He was not on that occasion a *witness.* No *testimony given by Caminetti* before Atkinson was offered before Judge Van Fleet. No question is here presented under Sec. 1324 of the Penal Code of any exemption of Caminetti from an indictment under the White Slave Traffic Act on account of any testimony given before Atkinson.

At pages 338-9 of their brief, counsel italicize the following language of Sec. 1324:

> "Any person shall be deemed to have asked to be excused from testifying or producing evidence, documentary or otherwise, under this section, unless before any testimony is given or evidence, documentary or otherwise is produced *by such a witness, a judge, foreman, or other person presiding at such trial, hear-*

ing, proceeding or investigation, shall distinctly read this section of this code to such witness."

The obvious answer to any argument based on the language thus quoted is that here we have *no witness; no person testifying; no testimony given; no trial; no hearing; no proceeding or investigation* at which the presiding officer was required under Sec. 1324 to read that section of the code to the witness giving such testimony.

The section in question is not aimed at extra-judicial declarations or admissions. It does not cover *extrajudicial confessions* made by any person "outside of the sitting of the court" (*Wharton's Cr. Ev.,* 622). Its purpose is to reach judicial confessions or declarations made by the accused in the court trying the crime charged. But if the statute, by any possibility of the imagination, could be held to cover the declarations here in question as competent evidence in the courts of the United States, we should say the statute would be a mere *brutum fulmen.* It must become as if it were not, in the face of a federal jury in a federal court trying a crime against the United States.

CAUTIONARY INSTRUCTIONS AS TO THE WEIGHT TO BE GIVEN EVIDENCE OF SELF-DISSERVING OR INCRIMINATING STATEMENTS.

Plaintiff in error complains that the unquestioned testimony as to the actual statements made by him before Assistant District Attorney Atkinson should be received with caution. In this, as

in their several other positions, with reference to this matter, counsel are in error. The reason for the caution sometimes exercised in connection with these matters is that there may be no question as to whether the statements attributed to the accused were voluntarily made or whether they were given under some promise of immunity, or made under circumstances wherein the statement as actually made by the witness was not entitled to credit. But if the statement was voluntarily made, if it was not made under any threat, under any coercion, under any promise of immunity, if the statement was actually made by a free agent, there is no reason why such statement, if clearly brought home to him, should be received with caution. In this connection we recall the attention of the court to the language of Mr. Justice Harlan in *Sparf v. United States,* 156 U. S. 51; 59 Law Ed. 343:

> "While some of the adjudicated cases indicate distrust of confessions which are not judicial, it is certain, as observed by Baron Parke * * * that the rule against their admissibility has been sometimes carried too far and in its application justice and common sense have too frequently been sacrificed at the shrine of mercy. *A confession, if freely and voluntarily made, is evidence of the most satisfactory character. Such confession * * * is deserving of the highest credit because it is presumed to flow from the strongest sense of guilt and therefore it is admitted as proof of the crime to which it refers.*"

With reference to this question we find the following laid down in *11 Encyc. Pleading & Practice,* p. 333:

> "In regard to instructions as to verbal admissions and confessions, there is much conflict of authority, but the weight of authority, it is believed, is to the effect that the trial court should not make any statement which will tend to disparage the value of such evidence. Accordingly it has been held erroneous to charge in substance or effect the rule laid down by Greenleaf expressing the necessity for caution as to evidence of admissions of parties, and the reason for such caution. The view taken by these decisions is that the statements made by Mr. Greenleaf are to be regarded as matters of argument rather than rules of evidence having the force of law; that while it is a matter of common knowledge that such evidence is liable to be erroneous, and for that reason it should be received with caution, yet such conclusion is only an inference of fact which must be made by the jury and not a presumption or a conclusion of law to be declared by the court."

In support of the doctrine of the text, the author cites cases from Arkansas, California (*Kaufman v. Maier,* 94 Cal. 269), Illinois, Indiana, Montana, Texas and Washington.

An examination of the cases civil and criminal, cited by the author from the seven states above named in the footnote, fully sustain the doctrine of the text.

In any case the giving or refusing of a cautionary instruction is a matter which must depend largely upon the discretion of the trial judge. There was nothing in the circumstances attending the statements made by Caminetti in the presence of Atkinson to necessitate the giving of any cautionary or warning instruction by the trial judge to the jury in the case here before the court. The position of counsel for plaintiff in error with reference to the refused instructions and to the alleged error of the trial court in admitting the testimony of the shorthand reporter Doan, is absolutely without merit.

Of like unworth as affording a foundation for the contention of counsel here made, is Sec. 860 of the Revised Statutes, quoted by them at page 344 of their brief. As counsel admit, that section was repealed in 1910. Furthermore, the statements made by Caminetti before Atkinson, were not in the course of a judicial proceeding, as we have abundantly shown in the preceding pages.

STATEMENTS OF LOLA NORRIS IN CAMINETTI'S PRESENCE AND HIS CONDUCT WITH REFERENCE THERETO.

In this subdivision of our argument the discussion has been confined to Caminetti's own statements. The principle involved and discussed covers likewise the statements of Lola Norris made in his presence and his conduct in reference thereto. The action of the trial judge in admitting her statements requires no separate discussion.

XVII.

THE COURT COMMITTED NO ERROR IN REFUSING DEFENDANT'S REQUESTED INSTRUCTION NO. 114 SHOWN IN THE RECORD AT FOLIO 468.

At page 318 of subdivision XVI of their argument, counsel complain of the action of the trial court in refusing an instruction to the jury that they were not to be influenced by the fact that Maury I. Diggs in another case might or might not be guilty. There was no occasion for giving any such instruction. The court directed the attention of the jury properly to the facts which were under consideration before them and instructed them that they were only to find the defendant guilty as to all or any of the counts in case his guilt was established to a moral certainty and beyond all reasonable doubt. The matters properly before the jury were distinctly called to their attention in the charge of the trial judge and the rights of the defendant were fully, clearly and properly stated.

XVIII.

THE TRIAL COURT COMMITTED NO ERROR IN THE PARTICULARS POINTED OUT IN SUBDIVISIONS XVII, XVIII, XIX AND XX.

At pages 320-321 counsel discuss the alleged error of the trial court in charging the jury as follows:

> "As I have indicated to counsel in passing upon the defendant's motion to instruct the jury to acquit, the evidence introduced before

> you by the government, if believed by you, is sufficient in its legal aspect, that is in law, to make a case against the defendant under each one of these counts."

The matter covered by this portion of the charge of the trial judge in our opinion has been abundantly covered in Subdivision VII of this argument, at pages 112 to 149. We shall not prolong the argument by repeating the suggestions there made.

At page 322 of Subdivision XVIII of their argument, counsel for plaintiff in error complain of the action of the trial judge in refusing the following instruction:

> "I further instruct you that where a statement or declaration of one conspirator made after the consummation of the conspiracy or the commission of the crime, is competent against the other, it must not only appear that they were uttered in his presence, but it must further also appear that the circumstances must have been such as to call for a denial by the accused, or give him an opportunity to make such denial."

The instruction as requested did not correctly state the law. The general rule on the subject is thus stated in *2 Wharton's Crim. Ev.,* Sec. 698, pp. 1430-1432:

> "The general rule is that admissions are only admissible against the party who makes them. But where several persons are proved to have combined for the same unlawful purpose, any act done by one of the party in pursuance of the concerted plan, with reference to the crime charged, is the act of all, and proof of such act

is evidence against any and all of the others who are engaged in the same conspiracy. When once a conspiracy or combination is established, *the act or declaration of one conspirator or accomplice in the prosecution of the enterprise, is considered the act or declaration of all and therefore imputable to all. All are deemed to assent to or command what is said or done by any one in furtherance of the common object.* But the competency of the evidence of such admission is determined by the fact that the conspiracy or combination existed. Hence, a foundation must first be laid by other evidence, by *proof sufficient in the opinion of the court to establish prima facie the fact of conspiracy between the parties.* Where the evidence is sufficient in the opinion of the court to establish the prima facie case, then it is admitted, and it is for the jury to say from all the evidence and the instructions of the court whether or not the conspiracy existed."

The proposition of law is so well established that we forbear the citation of further authority upon the point.

The facts before the court which have been abundantly discussed in the preceding subdivisions of this argument, clearly establish the existence of a criminal conspiracy of lust as between Caminetti and Diggs.

Under Subdivision XIX of their argument, at pages 323-325, counsel discuss the alleged error of the trial court in admitting certain testimony there set out with reference to the conduct of Diggs and Caminetti in the Riverside Hotel in Reno. The admission of this testimony is covered by the same

general principle stated by Wharton in the quotation just above set forth. Further discussion thereof is unnecessary.

At pages 326 to 328 of their brief, counsel discuss the proposition stated in this language:

> "The trial judge erred in his rulings that the prosecution amounted practically to one for a conspiracy."

In our opinion there is no merit in the claim. The matter of conspiracy and the language of the trial judge used with reference thereto are sufficiently covered by the language above quoted from *Wharton's Criminal Evidence.* Of course, Wharton's language as quoted by us from the text is abundantly sustained by the authorities cited in the footnotes to the section (Sec. 698, *2 Wharton Cr. Ev.*).

Subdivision XXI of the brief of plaintiff in error has been discussed by us in a preceding subdivision of this argument in connection with Subdivision XV of that brief.

XIX.

THE TRIAL COURT DID NOT ERR IN REFUSING TO PERMIT COUNSEL FOR DEFENDANT TO READ TO THE JURY PORTIONS OF THE WHITE SLAVE TRAFFIC ACT OR THE INDICTMENT UNDER WHICH DEFENDANT WAS BEING TRIED.

In Subdivision XXII of their argument counsel for plaintiff in error at pages 346 to 355b, discuss the proposition stated in this language:

> "The trial court erred in refusing to permit the attorney for defendant, in his opening statement to the jury, to read those portions of the 'White Slave Traffic Act' under which the defendant was indicted and was then on trial, and in refusing to permit the indictment to be read to the jury and in making prejudicial remarks in his rulings in that connection."

The prejudicial remarks referred to by counsel are the suggestion by the trial judge that he should confine himself in his statement or argument to the jury to the *facts* and leave the presentation of the *law* to the jury in the hands of the court, as well as the statement to them of the issues involved under the indictment.

Defendant's counsel at all times during the trial persisted in the attitude that the views of the trial judge as to the sufficiency of the indictment and the amenability of the defendant to punishment under the White Slave Traffic Act were not in accord with well established views of the law and rulings of other courts in that regard. Whatever merit there may have been in the views of the trial judge they were the only views which by any possibility could be regarded by the jury in passing on the questions of fact submitted to them for determination. In the trial of a jury case the *facts* are for the jurors and the *law* for the judge, with considerable latitude allowed in federal courts to the expression by the trial judge of his opinion as to facts.

In the earlier days of the administration of criminal law in the United States courts, claim was frequently made that jurors had a right to pass upon the law as well as upon the facts. That theory was long ago judicially repudiated. The subject was referred to by Circuit Justice Story in

United States v. Battiste, Fed. Cas. No. 14545.

He there said:

> (1043) "Before I proceed to the merits of this case, I wish to say a few words upon a point, suggested by the argument of the learned counsel for the prisoner upon which I have had a decided opinion during my whole professional life. It is, that in criminal cases, and especially in capital cases, the jury are the judges of the law, as well as of the fact. My opinion is, that the jury are no more judges of the law in a capital or other criminal case, upon the plea of not guilty, than they are in every civil case, tried upon the general issue.
>
> * * * * * *
>
> *"But I deny, that, in any case, civil or criminal they have the moral right to decide the law, according to their own notions, or pleasure. On the contrary, I hold it the most sacred constitutional right of every party accused of a crime, that the jury should respond as to the facts, and the court as to the law. It is the duty of the court to instruct the jury as to the law; and it is the duty of the jury to follow the law, as it is laid down by the court.* This is the right of every citizen; and it is his only protection. If the jury were at liberty to settle the law for themselves, the effect would be, not only that the law itself would be most uncertain, from the different views, which dif-

ferent juries might take of it; but in case of error, there would be no remedy or redress by the injured party; for the court would not have any right to review the law as it had been settled by the jury. Indeed, it would be almost impracticable to ascertain, what the law, as settled by the jury, actually was. On the contrary, if the court should err, in laying down the law to the jury, there is an adequate remedy for the injured party, by a motion for a new trial, or a writ of error, as the nature of the jurisdiction of the particular court may require. *Every person accused as a criminal has a right to be tried according to the law of the land, the fixed law of the land; and not by the law as a jury may understand it, or choose, from wantonness, or ignorance, or accidental mistake, to interpret it.* If I thought, that the jury were the proper judges of the law in criminal cases, I should hold it my duty to abstain from the responsibility of stating the law to them upon any such trial. But believing, as I do, that every citizen has a right to be tried by the law, and according to the law; that it is his privilege and truest shield against oppression and wrong; I feel it my duty to state my views fully and openly on the present occasion."

A well written note on this subject is shown in 1 Am. St. Rep. at page 54 following the California case there cited: *Sullivan v. Royer,* 72 Cal. 428:

"Jury Trial.—Where the distinct provinces of the court and of the jury are recognized, and the former is held to be the exclusive judge of the law, as the jury are of the facts, *it is clearly improper for counsel to argue questions of law to the jury, or to read law books or extracts therefrom in the course of their argument.* In

> the first place, such a course savors of disrespect to the judge on the bench, as it suggests to the jury that there are other exponents of the law to whom they may look in making their decision, and invites them to accept the law as read by the attorney, rather than as set forth in the instructions which the court is to give to them before they retire for deliberation. In the next place, whenever the jury is to be influenced by something which is stated to them and in their presence, as law applicable to the case, it ought to be in the form of instructions to which the opposing party may, if he so wish, reserve an exception. Otherwise, he is without redress, if that which is stated as law is, in truth, not the law at all; or if, though being sound law when properly applied, it is entirely inapplicable to the case under consideration. Besides, the reading of law books in the course of an argument must tend to confuse as well as mislead the jury. It distracts their attention from the facts of the case. The reading of such books may be permitted in the discretion of the court, if pertinent, by way of illustration; but, if its apparent object is 'to induce the jury to disregard the instructions, or to take the law of the case from the books rather than from the court', it should be checked by the judge, unless perhaps in those cases where the jurors are judges of the law as well as of the facts: Proffatt on Jury Trials, sec. 253; People v. Anderson, 44 Cal. 70."

In *1 Thompson on Trials,* Sec. 942, p. 783, the rule is thus stated:

> "In the courts of the United States and in the courts of most of the states, it is settled that counsel cannot be permitted to argue to the jury questions of law which have been decided by the court. Juries have no power to

judge of the constitutionality of acts of the legislature, and counsel consequently have no right to argue such questions to them."

In *Proffatt on Jury Trials,* Sec. 251, the matter of the reading of law authorities to the jury in argument is thus referred to:

> "In regard to the practice it is said in a California case that the *practice of allowing counsel in either a civil or criminal action to read law to the jury is objectionable and ought not to be tolerated."*

In Sec. 253, in speaking of argument on law, Proffatt uses this language:

> "Whether an argument on the law of the case can be made to the jury is very much doubted. It ought not to be permitted when the court is asked for a statement of the law and gives it to the jury as authoritative. And the court may rightly prevent the counsel for the defense from arguing the constitutionality of a law to the jury. * * * A court can always interfere and stop a counsel in an argument of law to the jury when its own opinion is fixed; and in that case it may refuse to allow any argument."

In this connection we ask attention to the following cases:

U. S. v. Morris, Fed. Cas. No. 15815;
U. S. v. Riley, 5 Blatch. 204, Fed. Cas. 16164;
People v. Carty, 77 Cal. 213-216;
People v. Anderson, 44 Cal. 70;
Sullivan v. Royer, 72 Cal. 251; 1 Am. St. Rep. 51.

Abundance of additional authority might be called to the attention of the court in this connection, but enough is above shown to establish the proposition stated in Sec. 942, *Thompson on Trials,* that:

> "In the courts of the United States and in the courts of most of the states, it is settled that counsel cannot be permitted to argue to the jury questions of law which have been decided by the court."

Defendant's counsel had no more right to comment on the terms of the indictment or to call the same directly to the attention of the jury than they had to state the law to the jury.

The indictment and its several counts were fully, clearly and intelligently called to the attention of the jurors by the trial judge. If by any possibility it could be claimed that there was error in refusing to permit defendant's counsel to read the indictment to the jury, it could not be regarded as prejudicial error because later the language of the indictment was clearly stated to the jury.

XX.

THE TRIAL COURT COMMITTED NO ERROR IN PERMITTING THE COMMENTS OF COUNSEL FOR THE GOVERNMENT WITH REFERENCE TO ALLEGED CONDUCT OF CAMINETTI WITH GIRLS OTHER THAN LOLA NORRIS AND MARSHA WARRINGTON.

At page 356 to 362 in Subdivision XXIII of their argument, counsel for plaintiff in error urge this proposition upon the court:

> "The trial court erred in its rulings and in its comments, and the prosecuting attorneys likewise erred in the questions propounded and the comments made by them with reference to the alleged conduct of the defendant Caminetti with certain girls other than Lola Norris and Marsha Warrington."

This subject matter is discussed in Subdivision VII of this brief at pages 172 to 176. The portions of the record involved and the action of counsel with reference thereto, in our judgment are sufficiently discussed in those pages of this brief.

At page 362, under this head, adverse counsel say:

> "In the previous portion of this opening brief, in the sixth subdivision thereof, we pointed out that, in a prosecution of the character involved in the case at bar, it is not permissible to permit evidence of the misconduct of the defendant with females other than the one with reference to which he is charged."

The question of law thus suggested to the attention of the court is referred to by us and the authorities cited on preceding page 145 of this argument in Subdivision VI. Further reference to the matter discussed in Subdivision XXIII of defendant's argument is, in our judgment, not necessary.

XXI.

THE TRIAL COURT COMMITTED NO ERROR IN REFUSING TO PERMIT THE DEFENDANT TO TESTIFY THAT HE HAD NEVER READ THE WHITE SLAVE TRAFFIC ACT.

The alleged error in this regard is discussed by defendant's counsel at pages 363-4. All human

experience attests that the vast majority of men who have committed crimes have never read the criminal statutes under which they were tried, convicted and punished. *Ignorantia legis neminem excusat.* Neither discussion nor citation of authority is required to justify the action of the trial judge in the matter here criticized.

XXII.

THE TRIAL COURT COMMITTED NO ERROR IN ANY OF THE PARTICULARS ASSIGNED BY COUNSEL FOR PLAINTIFF IN ERROR IN SUBDIVISIONS OF THEIR BRIEF NUMBERED XXV, XXVI, XXVII, XXVIII, XXIX, XXX AND XXXI.

The matters noted at pages 365 to 369 under Subdivision XXV of the brief of plaintiff in error refer to the conduct of some of the conspirators under the criminal conspiracy of lust—a conspiracy which is clearly shown. The matters therein discussed all had evidentiary value for the purpose of establishing the criminal intent with which Lola Norris and Marsha Warrington were transported in interstate commerce to Reno, Nevada.

The matter of criminal conspiracy and the acts and declarations of the conspirators in connection therewith, have been sufficiently discussed in preceding pages.

The matters discussed by adverse counsel in Subdivision XXVI of their argument, pages 370-372, refer to conversations and declarations occurring

otherwise than in the presence of Caminetti. This matter has already received sufficient attention in the presentation of our views on the subject of conspiracy.

At page 373 counsel discuss refusal of the trial court to permit testimony as to the condition of Marsha Warrington when told of the publication in the Sacramento Bee newspaper. The matter thus involved is of infinitesimal consequence, and could in no sense be prejudicial error and requires no discussion.

The same comment applies to the matter discussed at page 374 by defendant's counsel under Subdivision XXVIII of their argument. Also to the matter discussed at page 375 of Subdivision XXIX, and to the matters discussed at pages 376-7 under Subdivision XXX.

The matter considered under Subdivision XXXI at page 378 affords no reasonable ground for discussion. The purchase of the railroad tickets by Maury I. Diggs for the transportation of the four was evidently a proper matter to be considered by the jury.

XXIII.

THE TRIAL COURT COMMITTED NO ERROR IN ADMITTING THE STATEMENTS MADE BY MAURY I. DIGGS.

The record abundantly shows that Diggs and Caminetti were co-conspirators. Under such con-

ditions the acts and declarations of either in pursuance and consummation of the conspiracy, were properly admitted in evidence. The subject has been fully discussed in preceding pages and requires no further comment at this point.

XXIV.

NO PREJUDICIAL ERROR IS SHOWN IN THE MATTER DISCUSSED UNDER SUBDIVISION XXXIII OF THE BRIEF OF PLAINTIFF IN ERROR AT PAGE 382.

At pages 382 of their brief counsel criticize some remark of the trial judge. The matter as presented, without citation of authority or discussion of the circumstances, is a matter of minor consequence. No error is disclosed thereby—especially no prejudicial error.

XXV.

THE COURT COMMITTED NO ERROR IN DENYING DEFENDANT'S MOTION TO TRANSFER TRIAL OF THE CASE TO SACRAMENTO.

The cause was tried in the district wherein it was alleged in the indictment the offense had been committed. The only adjudicated case called to the attention of the court in connection with the position advanced and discussed by counsel, at pages 383 to 389 of their brief is:

People v. Powell, 87 Cal. 348.

That case affords no warrant for challenging the action of the trial judge in the case at bar. In that case, after two trials in San Mateo County, the district attorney moved to have the cause transferred for a further trial to the City and County of San Francisco. The transfer was made under Sec. 1033 of the Penal Code of the State of California. The defendant claimed that the law relied on was unconstitutional and that the transfer was in violation of his right to be tried by a jury of the vicinage in which the crime was charged to have been committed. The California Supreme Court sustained the view taken by prisoner's counsel. It in no sense presents facts parallel with those presented in the case at bar, and cannot justly be considered as an authority. The action of the trial judge in refusing to transfer to Sacramento was clearly proper. Here the case was tried by a jury in the district in which the crime was committed.

Summary.

Before closing this argument we deem it proper to suggest that a companion case is before this court for consideration—*United States v. Diggs,* No. 2404. The facts involved in both cases are substantially identical—covering the illicit relations of F. Drew Caminetti, plaintiff in error in this case, and Maury I. Diggs, with the young girls, Lola Norris and Marsha Warrngton, between October, 1912, and

March 14, 1913. The questions of law involved, with the exception of some minor matters, are identical. The cases were tried largely by the same counsel, and the oral argument in this court covered both cases. For that reason we respectfully request that in disposing of either case the views presented in the arguments of counsel in the other may be given consideration by the court.

The cases, in their earlier history, involved some notoriety and a large amount of acrimonious public discussion and comment. Counsel for plaintiffs in error in these two cases would have it appear that their clients have been made victims of an inflamed public opinion, tinctured somewhat possibly by political considerations, which in its operation became so powerful as to improperly swerve the trial judge and counsel for the government from the decorous treatment of an accused person on trial on a criminal charge.

Our only purpose in this argument is to present the facts as our lights permit us to see them and to suggest the legal principles that should be applied to them and the rules of law by which the action of all concerned may be actually, regularly and fairly determined with that degree of dignity and that exhibition of knowledge of the law which ordinarily characterize the administration of the law in the courts of the United States.

So much ground has been covered by the argument of adverse counsel that our reply has attained unusual length. For that reason we have prepared

an index to the argument showing the pages at which indicated subject matters have been considered. The action of the trial judge in commenting on the significant silence of the defendant with reference to the incidents of the Reno trip while voluntarily on the stand, and the similar comment made by counsel for the government have been made the subject of such severe, reiterated and persistent attacks that we have supplemented the authorities relied on by us in Subdivision IV of this argument with a list of cases on this subject which will be found in an addendum following this summary of our argument.

Under the facts of this record and the law of these United States we are abundantly justified in making the following claims:

1. Marsha Warrington and Lola Norris, two young women barely out of their girlhood, of good character and located in respectable Sacramento homes, unfortunately fell in the pathway of Caminetti and Diggs in the months of September and October, 1912. Diggs resolved on the conquest of Marsha Warrington and Caminetti became a willing and active instrument under his guidance, to aid him in the accomplishment of his purpose.

As early as November, 1912, Diggs had fully accomplished the ruin of the Warrington girl and established his adulterous relationship with her. Caminetti had set his desire on a similar result in the case of Lola Norris. The final accomplishment of

his set purpose was delayed until the days and nights of the sojourn in the Reno bungalow.

From October till March the two men co-operated in the accomplishment of their common design. While they may have been to some extent impelled to leave Sacramento and make the trip to Reno by other consideration, the *paramount purpose of the Reno trip was the expected or continued enjoyment of the bodies of these two young women.*

The facts, as found by the jury, show the character of guilty criminal intent denounced by the White Slave Traffic Act. The finding of the jury is conclusive here if the law be as laid down by the trial judge and as we believe it to have been authoritatively and repeatedly declared by the courts of these United States.

2. The charge of Judge Van Fleet was neither misleading nor confusing, nor did it evidence any disregard of the rights secured by the statutes and the constitution to an accused on trial.

3. The White Slave Traffic Act was an authorized exercise of legislative power by the Congress under the Commerce Clause of the Federal Constitution.

4. The accused having voluntarily taken the stand as a witness became subject to the same tests as any other witness. His actions on the Reno trip were more persuasive in establishing his purpose in making that trip than any other testimony could have been. He was silent. He refused to explain or

deny. Under the law, as administered in the American courts, his conduct was properly the subject of comment by the trial judge and equally a subject of proper comment by counsel for the government.

We ask the court to bear in mind that the additional cases on this point are shown in the addendum following this summary. We also ask the court to bear in mind that this same subject matter is discussed in the government brief filed by us in the companion case of *Diggs v. United States,* at pages .....

5. Lola Norris and Marsha Warrington were not in fact nor in law accomplices of Caminetti or of Diggs. Neither under the facts nor under the law was it the duty of the trial judge to declare them accomplices or to advise the jurors that their testimony should be viewed with distrust. Neither of the victims, under the law, could have been indicted, tried or punished for a violation of the White Slave Traffic Act. If, in fact or in law, they were accomplices, the refusal of the requested instruction constituted no prejudicial error. The giving of warning instructions is a matter entirely discretionary with the trial judge. The circumstances of this case afforded no warrant for the giving of such instructions in the case with reference to Marsha Warrington or Lola Norris. No jury composed of sane men could, as to the facts involved in the Reno trip, have arrived at a different verdict than that the facts of that trip were exactly and identically as disclosed by the two girls.

6. Under the facts and under the law, the court was justified in refusing to acquit. In the transportation of the two young women to Reno, in the procurement of the tickets for the trip, Caminetti was as responsible as Diggs. Diggs by his suggestion and advice was "boss" or manager of the trip. The purpose of the trip was that the two girls should be the concubines and mistresses of the two men during their proposed indefinite stay in Reno. The conduct of the two men before, during and after the trip all established the guilty purpose of the trip and the violation of the White Slave Traffic Act.

7. There was no misconduct amounting to prejudicial error in any declaration or suggestion of government counsel. As suggested by Mr. Roche during the argument, Caminetti did in fact try to "hide behind the respectability of a loyal wife", whom he had deserted when his youngest child was but three weeks old.

In all courts, federal and state, a liberal allowance is made to prosecuting officers in making their argument. An inadvertence in statement or a misapprehension or a misunderstanding of the facts as understood by others, has never been regarded in any court as a just cause for the reversal of a righteous judgment. Every statement of government counsel as to a fact or inference finds absolute justification in the testimony disclosed by this record.

8. The court committed no error in the refusal of the several instructions set out by counsel for

plaintiff in error in the several subdivisions of their argument. In so far as the instructions offered correctly stated the law, they were covered by the charge in which the law was fully, fairly and clearly stated by the trial judge.

9. The most amazing suggestion made in the briefs of counsel on behalf of both plaintiffs in error—made in the identical language in both briefs —is that Judge Van Fleet overlooked the only issue in the case, and likewise that the government counsel similarly overlooked that only issue. It seems remarkable that after all the experience of Judge Van Fleet as a trial judge, as a justice of the California Supreme Court and as District Judge in the Northern District of California, he should not, with the aid of all the counsel engaged in this case, have been able to discover what was the only issue involved. In our opinion he realized and stated clearly the issue involved and every rule of law proper to be considered by the jurors in its determination.

10. The court committed no error in admitting the testimony of Doan, the shorthand reporter, as to Caminetti's declarations and conduct on the train returning from Reno. His declarations in no sense constituted a confession of guilt under the White Slave Traffic Act. On the contrary his entire attitude was that he had been guilty of no crime whatever. He certainly made no confession of guilt. His disserving declarations as distinguished from a judicial confession, were, under recognized rules

of criminal evidence, proper to be stated before the jury, as likewise his conduct at the time when Lola Norris made the declarations in his presence.

11. The court committed no error in refusing to permit counsel for plaintiff in error to read the indictment or to read the law to the jury during the trial.

12. In our judgment the trial court committed no error during the trial. If any error be shown it is infinitesimal in character and certainly not prejudicial in effect. The verdict and judgment of the lower court in our opinion should stand as the final determination of the cause.

Dated, San Francisco,
November 28, 1914.

Respectfully submitted,

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ADDENDUM.

ADDITIONAL AUTHORITIES ON POINT THAT COURT OR COUNSEL MAY COMMENT ON SILENCE OF DEFENDANT AS A WITNESS OR HIS FAILURE TO EXPLAIN OR DENY INCRIMINATING CIRCUMSTANCES.

In view of the persistency with which the several cases decided by the Supreme Court of Missouri have been urged upon the attention of this court by plaintiff in error in the present case, and by Diggs in his brief, we ask attention to some very recent adjudications made by the Supreme Court of Missouri. As indicated by us, the Missouri decisions relied on by adverse counsel were out of line with the general trend of American authority on the subject. Since the Government's brief in the Caminetti case was set up by the printer, two Missouri cases have come to our attention which were not cited in that brief. They are the cases of

State v. Raftery, 158 S. W. 585-8 (decided by the Supreme Court of Missouri, June 28, 1913);

and

State v. Larkin, 157 S. W. 600-4 (decided by the Supreme Court of Missouri in May, 1913).

In the Raftery case the court said:

> "This court has recently held in State v. Larkin that *counsel for the state has the right to comment on the failure of the defendant, while*

on the stand, to deny incriminating statements attributed to him by other witnesses. It is a wholesome rule, and we abide by it."

In the Larkin case the court said:

"Defendants strenuously urge that the court erred in permitting the prosecuting attorney to comment upon the failure of defendant Roy Larkin who took the stand as a witness in his own behalf, to deny certain statements which the prosecuting attorney averred had been made by him to Mrs. Harris * * * (p. 605.) We have carefully examined the statutes and holdings upon this question of more than thirty states, and we find that it has been held universally that, if the defendant is not sworn as a witness in his own behalf, any comment by the prosecuting attorney on his failure so to testify constitutes reversible error, in the absence of a peremptory and proper rebuke by the trial court. But, on the other hand, except in our own state and in California, where the question has been sometimes doubted, *the right of the prosecuting attorney to comment upon the failure of the defendant, when he takes the stand as a witness in his own behalf, to deny or explain incriminating facts and statements, has been uniformly held allowable."*

The Missouri Supreme Court, in its opinion, calls attention to the following list of cases which, on examination, will be found to sustain the doctrine so clearly set forth in the opinion:

Solander v. State, 2 Colo. 56;

State v. Tatman, 59 Iowa 471; 13 N. W. 632;

Stover v. People, 56 N. Y. 315;

Heldt v. State, 20 Neb. 500; 30 N. W. 626; 57 Am. Rep. 835;

Comstock v. State, 14 Neb. 205; 15 N. W. 355;

State v. Staley, 14 Minn. 118 (Gil. 75);

Cotton v. State, 87 Ala. 103; 6 So. 372;

Clarke v. State, 87 Ala. 71; 6 So. 368;

Lee v. State, 56 Ark. 4; 19 S. W. 16;

McCoy v. State, 46 Ark. 141;

Brashears v. State, 58 Md. 567;

McFadden v. State, 28 Tex. App. 241; 14 S. W. 128;

Lienburger v. State, (Tex. Cr. App.) 21 S. W. 603;

Parker v. State, 62 N. J. Law 801; 45 Atl. 1092;

State v. Harrington, 12 Nev. 125;

State v. Ulsemer, 24 Wash. 659; 64 Pac. 800;

Hanoff v. State, 37 Ohio St. 178; 41 Am. Rep. 496;

State v. Ober, 52 N. H. 459; 13 Am. Rep. 88;

State v. Glave, 51 Kan. 330; 33 Pac. 8;

Toops v. State, 92 Ind. 13;

Commonwealth v. McConnell, 162 Mass. 499; 39 N. E. 107.

The court, in its opinion, further discusses the subject in the following language:

> "The rule that no reference shall be made to the neglect, failure, or even refusal of a defendant to avail himself of his right to testify shall not be commented on in the event he does not become a witness in his own behalf is therefore, we find, universal; but, on the contrary, *the rule that if he does go upon the witness stand*

he then stands in the precise attitude of any other witness is, except in this state, and, as stated, in California, where the rule is subject to some doubt, also universal. Mr. Wharton, in his learned and able work on Criminal Evidence lays down in the tenth edition thereof the rule that *such comment is allowable;* to this statement of the text he cites no exceptions, and correctly quotes the Missouri courts as entertaining like views. Wharton, Crim. Ev. (10th ed.) sec. 435a. * * * For many years, and in practically every jurisdiction in the American Union, it has been vehemently urged in perhaps more than a hundred cases that the right of the state to cross-examine a defendant who at his own request, and not otherwise, takes the stand as a witness in his own behalf, is limited by the constitutional inhibition against self-incrimination. But, without citing cases, it may be said that *this question is now well settled against the contention urged. The contention that,* absent a statute such as we have, *cross-examination is limited by the constitutional rule against self-incrimination, has been exploded utterly on the ground that there is sufficient protection against self-incrimination when it is provided that a defendant may or may not testify for himself, according as he may desire.* * * *

(606) Nothing is clearer, when we consider the history of this legislation, when we consider that at common law the defendant could not testify in his own behalf, and that the two sections of our statute were intended to modify the common law, and when we consider the rule that *this modification of the common law ought to go no further in its construction than its terms expressly provided, and that there is no legal or statutory prohibition against comment by the prosecuting attorney in any case, if in fact the accused does avail himself of his right to testify.*

In logic and reason it is no argument against this view that the state by an express statutory provision is precluded from cross-examination of the defendant upon any matter other than that about which he shall himself testify in his examination in chief. * * * *Other states,* as we have seen, without having in their statutes the provision that a defendant testifying for himself 'may be contradicted and impeached as any other witness in the case', *have, yet with practical unanimity, held that, if a defendant avails himself of his right to testify he then stands as any other witness, and his silence in explaining and his failure to deny or contradict incriminating facts, statements, or circumstances may be fully commented on by the prosecuting attorney.* It is our duty to construe our own statutes as we find them in the light of their language, intent, and logic. *There is no valid reason for the construction which has long been put by this court upon this provision of our statute. It is in absolute conflict with the rule announced by the text-writers and diametrically in conflict with the holdings of at least forty-six states in this Union on this identical question.* In Iowa, as has been noted, there is a statute making the prosecuting attorney guilty of a misdemeanor if he refers to the failure of the defendant to take the stand and testify in his own behalf, but if the defendant does take the stand, and does make himself a witness for himself, the right of comment upon the defendant's failure to deny, or contradict incriminating facts, statements or circumstances is left absolutely open to the state. State v. Tatman, supra. Time and again, ever since the rule announced in State v. Graves, supra. which is now criticised, was first enunciated, this question has been up for ruling. *It needlessly, and in the writer's view erroneously, reverses more cases than any other single point which*

we are called on to review. * * * For years subsequent to the rendition of the opinion in State v. Graves, supra, where the contrary doctrine to the one discussed here was first enunciated in this court, *the cognate rule above referred to of presumption arising as a matter of law from the failure of the defendant to deny incriminating facts or circumstances was fully recognized.* * * * (Citing cases.) * * * It is difficult to see why, if such a presumption is as a matter of law entertained against a defendant when he takes the stand as a witness in his own behalf, such presumption might not be commented on by the prosecuting attorney in a case where the defendant likewise becomes a witness in his own behalf. We concede that, if there were any restrictions whatever placed upon the defendant as to the nature or extent of his testimony when he has elected to become a witness for himself, then there would be some reason in the rule. But there is no such restriction upon him. *His right to explain, deny and contradict is as unlimited as the rules of evidence, and as broad as the issues pertinent to the matter under inquiry. In order to reach this conclusion, we must perforce read into section 5243 words that have not been placed in that section by the Legislature.* We must make the first clause of that section read: 'And if the accused shall not avail himself of his * * * right to testify, *on any question, point, fact or circumstance, then'* etc. When we consider that the statute in question changes the common law, it is difficult to see our warrant for *reading into this section words that the Legislature has not in express language placed therein. We conclude that the case of State v. Graves,* 95 Mo. 513, 8 S. W. 739, *which enunciated the rule that no comment shall be made by the prosecuting attorney or other counsel for the state on the failure of the de-*

fendant to testify about or to deny or contradict any statement, fact or circumstance in the case, as well as other cases in this state which announce the same rule, following the case of State v. Graves, ought to be overruled and no longer followed in this behalf."